Hugh Cecil Earl of Lonsdale.

THE

LAWS OF GAMING,

WAGERS,

HORSE-RACING,

AND

GAMING-HOUSES.

BY JOHN DISNEY,

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ADVERTISEMENT.

Not having been able to find any Work of a similar nature to the present, and as the subject is very generally interesting, the Author has been induced to put together the following sheets. It has been his object to avoid, as much as may be, technical terms, in order to render the book as generally acceptable as possible; endeavouring, at the same time, to make it a useful Compendium to the Profession.

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INTRODUCTION.

GENERALLY speaking, it is in the power of every man to contribute something towards the good of mankind. Professional men, and men of literature or science, have it in their power to exercise this duty by the diffusion of that knowledge in which they are supposed to be more particularly conversant. Under this idea, I have employed some time and industry on the present work, not without advantage to myself in my professional studies, and, I hope, not wholly unprofitably to others: and have appropriated part of my plan to a general consideration of the subject, in order to render my labours more generally interesting and serviceable.

Gaming is so destructive to the happiness of society, and so subversive of the comfort of individuals, that every friend to good morals must wish, as far as it may be found practicable, the entire eradication of it.

It is with a view to this eradication that laws, in almost every state and every age, have been made, inflicting either disgrace or punishment on the gamester. And here I will introduce the conside-

ration of the laws of our own country, by a short review of those of other nations in remoter ages. Amongst the Jews, a gamester was excluded from the magistracy, and was rendered incapable of being chosen into the greater or lesser Sanhedrim; nor could he be admitted a witness in any court of justice till they were perfectly reformed. By the laws of the ancient Egyptians, a gamester being convicted (whom any one might accuse) was condemned to servitude in the quarries. The Roman Ædiles were authorized to punish gaming; and this authority was suspended only during the Saturnalia: a time of general mirth and freedom, when a latitude was given to licentiousness. By a particular law, distinguished by the name of *Lex Cornelia de Lusu*, playing for money was prohibited amongst the Romans; and its near analogy to our law is very striking: it runs thus: "That no "person shall play *for money, or upon trust, or* "*security given for it*, unless in games of exer- "cise, such as quoits, throwing the javelin, or the "ball — running, leaping, wrestling, or the like, "which tend to courage." — See Rosinus' Roman Antiquities, book 8. chap. 31.

Justinian, in an authentic to one of the Pandects, takes notice of gaming thus, where the analogy is very strong between the Roman law and our own on the same subject: indeed, it is

not improbable that this may be the foundation of our present statutes.

This difference, indeed, is observable; that, while the Romans permitted games of wrestling and pugilism, and excepted them from the penal laws against gaming, ours prohibits them with one and the same rigour; and this arises, probably, from the modern manner of raising armies, and modern mode of making war. The law to which I refer, is as follows:—"Commodis, igitur, subjectorum prospicientes, hac generali lege decernimus, ut *nulli liceat in publicis, vel privatis domibus, vel locis ludere; neque in genere, neque in specie.*" Codex lib. 3. tit. 43. de aleatoribus.

The Roman Emperor also complains of persons playing night and day for gold and silver, and even for their trinkets and ornaments of precious stones. The sum also to be played for, it is stated, was not to exceed a solidus, a piece equivalent to, or nearly of the value of, twelve shillings English. Persons who, by their presence, countenanced gaming-tables, were as punishable as those who played, though they did not take part in the game. There is, in the laws of Justinian, a distinction, in point of criminality, made between the clergy and laity in respect to gaming; our law considers them as common persons, and puts them, as to this matter, on the same footing;

but the general voice of mankind has very justly fixed a deeper stigma on the misconduct of the clergy than on other persons, because their very profession pre-supposes the exercise of moral duties, in conformity to their own instructions. Money lost at play could not be legally recovered by the winner; and money paid might have been reclaimed by the loser. If he neglected such claim, his heir might sue for it; or, in case of his default, the defensor of the city; or it might be recovered to the use of the exchequer or state-treasury, within fifty years.

Mortgages and securities for the payment of money lost at play, were all considered invalid and nullities. Compelling, or enticing any one to play, was punishable with fine, imprisonment, and hard work in the quarries. By the Prætorian edict, using force to make a man play, was punishable in the same manner: and, Menochius, the commentator on this law, says, that though the text only speaks of force, it will hold good also in the case of persuasion. The master, or father, had, according to Paulus, a remedy against any one who induced his son, or his servant, to game. And, as a check to those who kept gaming-houses, it was not allowed them, by the same Justinian code, to maintain an action against any one who had beaten them, either at home or abroad; and, they kept false dice in their houses,

the house was forfeited to the state, if it belonged to the offender; and the same if another's, provided the owner knew it to have been used for gaming.

The Eastern code of the *Basilica* was founded on this *Alearum Usus* of Justinian, and, indeed, almost a literal copy.

The laws of the Franks and Germans seem more particularly pointed against this vice in the clergy; and punished them for it by deprivation and excommunication.

The Koran prohibits games of hazard, as abominations, and tending to the sowing of dissentions and horrors amongst men.

Thus the legislators, in almost all ages, have considered gaming as a vice of importance, sufficient to excite their attention, and to warrant strong penal laws to suppress it. It is the same with us. Those laws, are, indeed, very seldom put into execution; very seldom, in comparison with the number of instances in which they are broken. The laws of the land, however, which are founded in morality, are not of less force than the laws of honour. "Here, too, we may note "this excellent man's (Mr. J. Foster) opinion "upon that punctilio of honour; by the rules of

" which some men affect to palliate, and others to " justify, crimes of the blackest dye, the grossest " frauds, gambling, seduction, adultery, murder. " Such was and is the law of honour: and no " man, who will attend to the subject, can doubt " of it (*a*)."

This latter description of law is so prevalent, and uncontrolled in society, that, where it obtains, it will prevail. Dr. Paley defines it to be, " a system of laws constructed by people of fa- " shion, and calculated to facilitate their inter- " course with one another, and for no other pur- " pose." However, it is not wholly without its uses, inasmuch as it keeps society together; and, in some few cases, enforces the laws of morality; and, we can only regret, that all its demands do not coincide with the moral duties of mankind. It is a rule pretty generally acknowledged in laws of play, *that one side ought not to have any advantage over the other*; and on this it is very fairly remarked, that " it is neither practicable " nor true;" and the same author solves the meaning of it to be, " that neither side have an " advantage, through means of which means the " other is not aware." This, I think, may be considered as allowable by the laws of honour:

(*a*) Mr. J. Grose's Judgment, in the King *v.* Rice, 3 East R. 583.

for, it is physically true, that both sides cannot be equal in skill, judgment, or management of temper; and not offensive to the laws of morality, because no deceit is practised.

The reflection of Mr. J. Blackstone on gaming, has much force:—"Next to that of luxury, naturally follows the offence of gaming, which," says he, "is generally introduced to supply, or retrieve, the expences occasioned by the former; it being a kind of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and, therefore, they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer."

Among other species of gaming, may be ranked the Lottery: and, though our laws are severe against this vice in general, and when practised between individuals, yet do they sanction it under this particular shape; and that, simply, because it is productive to the revenue. It is not my design to comment upon the laws as they relate to Lotteries; I leave them to the reflections of every man who is acquainted with their nature and effect. The following pages have been compiled for the use of all whom they may concern, or to whom they can apply. It may be of some use to the lawyer, by saving him the infinite trouble of look-

ing for cases; it will also be useful to the private gentleman, in shewing him in what light the law of his country regards a vice so destructive of every moral duty.

Horse-racing is, indeed, more favoured by the legislature than many other species of play; because the breed of that very useful animal is much improved by the attentions necessary to fit him for the course: but this is regulated by restrictions, to prevent an excessive increase of it.

Of the division of these pages, it will be necessary to say something. I have endeavoured to make it sufficiently copious and minute, without branching it out into unnecessary ramifications.

The consideration of what wagers are lawful, and what are not so, is the object of the First Chapter. A wager, or bet, is a sort of gaming; and, undoubtedly, bears a near relationship to it; it is attended with some difficulty to define what it is, so as to distinguish it from other gaming. Dr. Johnson says, it is "any thing pledged upon "a chance or performance;" but it seems to include this additional circumstance, that the person laying the wager should not be concerned in the performance; as *A* lays a wager with *B*, that *C* is older than *D*; this seems to be a wager, properly so speaking. Yet we say,—I lay you a wager of

so much, that I can run six miles in an hour: here the layer of a wager is an actor in the trial which is to decide it. We also say, "I lay a wager with you, that I can run faster than you;" here both are actors in the means of deciding; yet it is called a wager.

In the Second Chapter is considered the situation of the person into whose hands the money, to be paid to the winner, is deposited; who, in technical language, is called the Stake-holder; and, being a person uninterested in the event of the bet, is the guardian of both parties concerned. This I thought deserving of a distinct Chapter, as he bears relations wholly different in almost all cases to any other person concerned.

The Third Chapter is occupied by the consideration of the peculiar sport of Horse-racing. As this is so important a subject in this country, and so much attended to by the first characters for rank and fortune, I should conceive it to have been unpardonable to have given it less consideration than I have done. It is, in some degree, distinguished from any other species of sport by the consequence to which it has risen; and it claims our notice, and some indulgence, as the nursery for the improvement of the breed of one of the most useful animals in the creation. And, for this latter reason, it has been peculiarly favoured

by the legislature, as appears from the preamble of the statute of 13 George the Second.

The next Chapter, the Fourth, will shew what sports or games are allowable, and what are discountenanced by the laws.

I have appropriated one distinct Chapter (the Fifth) to the consideration of securities given for money *lent* professedly to play with; partly, because the legislature have considered it of sufficient importance to enact a law particularly levelled at such securities; and partly, because many men may be led, through ignorance of the law, inadvertently to give, or join in these securities. The law itself, on these points, is perhaps more difficult to distinguish correctly than on any other part of the subject.

The Eighth Chapter treats of the nature of public Gaming-houses, which are, indeed, more properly objects of criminal than civil process:—nevertheless, I conceive some particular notice should be taken of them.

Considering public Gaming-houses as the receptacles of misery and the nurseries of vice, the law has been more severe against them, and the persons concerned in them, than against any other attendant circumstances of our subject. On this

account Gaming-houses and the keepers of them are subjects of indictment; that is, they are required to make atonement to society for having committed a crime. The subject, therefore, is treated in a very different light from any preceding; for, instead of considering the principles of retribution for an injury, we have, in this case, to consider how punishment is to be inflicted upon the crime; which constitutes the great distinction between the civil and criminal part of our law.

In my Seventh and last Chapter, I have selected many references to forms of pleadings in cases of Gaming and Wagers, and also the points which have been determined upon questions of pleading, in these cases, by the Courts of Westminster-Hall. This Chapter will, therefore, be considered as more peculiarly adapted to the use of gentlemen in the profession; and to them it is now more particularly submitted. This Collection of Cases and Pleading, as most things of this kind are, must necessarily be imperfect; my endeavours have been to make it as useful as my present reading and observation will enable me.

Inner Temple-Lane,
February, 1806.

THE

LAWS

OF

GAMING AND WAGERS.

CHAPTER I.

OF WAGERS WHICH ARE LEGAL, AND THOSE WHICH ARE NOT.

IN pursuance of the plan which I have marked out in my introductory chapter, I proceed to consider what wagers are allowed by our law; *i. e.* what wagers those are where the law allows the winner to recover, in a court of justice, the sum which he has won. I shall, in the course of this enquiry, notice those cases in which particular wagers are judicially decided to be recoverable, and consequently lawful; and those which have received positive decisions to the contrary. It will be my endeavour, however, to extract a general rule from the cases taken together, and to lay that down as a test for forming a subsequent judgmer

We may, by a little attention, perceive that there is a common principle which runs through the whole string of decisions on these questions, and to which we may refer any case that occurs.

Having premised thus much, we may, I think, without any great hazard, state the general rule to be,

"That all wagers are legal, excepting those "which tend to a breach of the peace;—or "are *contra bonos mores*;—or tend to hurt "the character of, or expose to ridicule, a "third person;---or are against the rules of "sound policy and morality;---or are con- "trary to a positive enactment of the law."

Lord Mansfield, indeed, in the case of Da Costa v. Jones (*a*), has in some degree given a general rule in his judgment. ---"Indifferent wagers," says he, "upon indifferent matters, without interest to "either of the parties, are certainly allowed by the "law of this country, so far as they have not "been restrained by particular acts of par- "liament."

Subject to these rules, and under these restrictions, the winner of a wager may recover the sum won by an action at law. But, notwithstanding,

(*a*) Da Costa v. Jones, Cowp. 734.

the Courts look with a scrutinizing and a jealous eye upon actions of this sort, and discourage them as much as possible, consistently with their duty; though, bound down by the rigid rule of law, they cannot help regretting that the law is so. Thus the learned judge already quoted, in that very case, says, "This species of contract "has, in fact, gone to an extent that is much to "be complained of. Whether it would not have "been better policy to have treated all wagers "originally as gaming-contracts, and so have held "them void, is now too late to discuss; they have "too long and too often been held good and valid "contracts." However, the law being settled, I will take the cases as they occur in order of time.

Though it is immaterial whether an event upon which a wager is laid be contingent or not; yet, when the wager depends upon a contingent event which has in fact happened, it is necessary that the parties should be ignorant of it at the time of laying the wager; as in the case of Lord March *v.* Pigot (*a*).

The circumstances of that case were, That Mr. Pigot and Mr. Codrington being together at Newmarket, it was proposed to run their fathers against each other. Mr. Pigot's father was upwards of 70,

(*a*) Lord March *v.* Pigot, 5 Burr. 2802.

and Mr. Codrington's father little more than 50. The chances were calculated; and Mr. Codrington thinking them disadvantageous to him, declined the bet: whereupon Lord March agreed to stand in his place; and mutual notes were interchanged. Mr. Pigot's note was,

" I promise to pay to the Earl of March 500 " guineas, if my father dies before Sir William " Codrington.

" William Pigot."

The Earl's was,

" I promise to pay to Mr. Pigot 1600 guineas, " in case Sir William Codrington does not survive " Mr. Pigot's father.

March."

The fact was, that Mr. Pigot's father was then actually dead; but that was wholly unknown to the parties.

At the trial, a verdict with 525 *l.* damages was found for the plaintiff.

On a motion for a new trial, it was contended on the part of Mr. Pigot, that as he could not possibly win, he ought not to lose; and it was compared to a ship-insurance. If the policy upon a ship had not the words " lost or not lost" inserted, and the ship should be actually lost at the time of making that policy, it would be void.

For the plaintiff it was argued, that the contract was good, because the *fact* being wholly unknown to the parties, it could not influence either: and the Court were of this opinion, and unanimously refused the new trial.

A wager was held to be good (*a*), "Whether a "decree of the Court of Chancery would be re-"versed or not, on an appeal to the House of "Lords."---The decree was reversed; and the plaintiff obtained a verdict for 50*l.*, the amount of his wager.

It was endeavoured to arrest the judgment, upon a suggestion that the wager was not contingent, but certain; because the rules of law are known and certain; and, secondly, That it was *contra bonos mores*.

Lord Mansfield, in giving his judgment, says (*b*), "The question then is, Whether this wager is *against* "*principles?* If it be contrary to any, it must be "contrary either to principles of morality (for the "law of England prohibits every thing that is *con-*"*tra bonos mores*); or it must be against princi-"ples of sound policy; for many contracts which "are not against morality, are still void, as being "against the maxims of sound policy. With re-

(*a*) Jones *v.* Randall, Cowp. 37.
(*b*) Cowp. 39.

"spect to the first question, Whether it is against 'morality? This contract is equal between the "parties; they have each of them equal know- "ledge or equal ignorance: it is concerning an "event which, reasoning by the rules of predesti- "nation, is to be sure so far certain, that it must be "as it should afterwards happen to be. But it is "a future event equally uncertain as to the parties, "Whether the House of Lords would be of the "same or of a different opinion with the Chan- "cellor? The presumption, if any, is rather against "the person betting in opposition to the Chan- "cellor's judgment." And further: "If the pre- "sent wager had been made with one of the "Judges, or with one of the Lords, it would have "been a bribe." Again: "If it had been a wager "with either the attorney or counsel in the cause, "it would have been an objection."

The Court here, being of opinion that the wager was not against any of the rules before laid down, held it to be good; and the plaintiff recovered accordingly.

But where the wager (*a*) is productive of indecent evidence unnecessarily, and involves the happiness of an innocent third person, the Court will not only discountenance the action, but will, upon

(*a*) Da Costa *v.* Jones, Cowp. 729.

the suggestion of that third person (*a*) stop the plaintiff from further proceeding; and in an action where a third person was thus affected, the Court did exercise this power (*b*).

The case of Da Costa *v.* Jones is a case of great importance, and a leading one on these points; and it may not be improper to give it a very full consideration. I shall first state the circumstances of the case itself, and then the judgment of the Court, which contains the principles of the subject laid down by Lord Mansfield, with his own peculiar clearness and elegance.

This was an action of *assumpsit*, upon a wager between the plaintiff and the defendant, upon the sex of Monsieur le Chevalier d'Eon, who was so described in the declaration; which stated, that the defendant, on the 4th of October 1771, in consideration that the plaintiff would then and there pay him 75 guineas, undertook to pay to the plaintiff 300 *l.* in case the Chevalier should *at any time* prove to be a female.

The cause was tried before Lord Mansfield, at Guildhall, at the Sittings after Michaelmas Term

(*a*) Cowp. 736.
(*b*) Coxe *v.* Phillips, Ca. Temp. Hardw. 237.

1777, when the jury found a verdict for the plaintiff of 300*l.* At the trial, the defendant's counsel objected: that it would produce indecent evidence; and then it was answered, that that appeared upon the *record*, and must be objected to in another way. Lord Mansfield concurring in this, suffered the trial to go on; which, however, he afterwards regretted that he had done.

On a motion in arrest of judgment, the case was argued at great length by Mr. Wallace, Mr. Buller, and Mr. Dunning, for the plaintiff; and Mr. Bearcroft and Mr. T. Cowper, for the defendant: but as Lord Mansfield has taken notice, in his judgment, of all the points discussed by counsel in the argument, I shall omit them, and insert his words at length, which will comprehend the whole; they are these:

" This case (*a*), upon the trial of the first cause, made a great noise all over Europe; and soon afterwards, I own, I was sorry that the answer given to the objection made at the trial, " that it " appeared upon the record," had been so hastily given way to by me. I was sorry that the nature of the action had not been more fully considered. I was sorry for another thing; that the witnesses who were subpœna'd had not been told they might

(*a*) Cowp. 734.

refuse to give evidence, if they pleased. But no objection was made on their behalf by the counsel for the defendant, nor did any of themselves apply for protection, or hesitate to answer. I have since heard that many of them were confidential persons, servants, and others employed in the way of their profession and business. Had any of them demurred, it would have opened the nature of the action. That two men, by laying a wager concerning a third person, might compel his physicians, relations, and servants, to disclose what they knew relative to the subject-matter of that wager, would have been an alarming proposition; the bare stating it would have startled. Indeed, the objection being put upon the general crude ground of the cause leading to indecent evidence, and not upon the special nature of this case, did not strike me. For indecency of evidence is no objection to its being received, where it is necessary to the decision of a civil or criminal right. And upon that ground we think Mr. Justice Burnet did wrong, in rejecting the case that came before him; for there, the party had received an injury. But if it had been an action upon a wager, Whether such a woman had such a defect or infirmity? it would have been nearly the present case. Indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by particular acts of Parliament; and the

restraints imposed in particular cases support the general rule; for where Parliament interposes, and says, "Unless you have an interest in such a "case, any wager or insurance upon it shall be "void and of no effect," it implies, that in cases not specially prohibited by act of Parliament, parties may wager or insure at pleasure; and this species of contract has, in fact, gone to an extent that is much to be complained of. Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss: they have too long and too often been held good and valid contracts. But notwithstanding they have been so generally entertained, there must be a variety of instances where the voluntary act of two indifferent parties, by laying a wager, shall not be permitted to form a ground for an action, or a judicial proceeding in a court of justice. Suppose a wager between two people, that one of them, or that a third person, shall do a criminal act. To go from stronger cases to those that are less strong: "I lay you a wager that you do not "beat such a person; you lay that you will." Such a wager would be void; because it is an incitement to a breach of the peace. Suppose the subject-matter of a wager were a violation of chastity, or an immoral action. "I lay I seduce such a wo-"man." Would a court of justice entertain an action upon such a wager? Most clearly not;

because it is an incitement to immorality. Suppose a wager upon a subject *contra bonos mores*, like the case of Sir Charles Sedley,—would a court of justice try a wager that incites to such indecency? It may be said, that there are no adjudged cases; but you offend, you misbehave by laying such a wager. To come nearer to the point: Suppose a wager that affects the interest or the feelings of a third person, which is one of the grounds upon which the motion for a new trial in this case has been argued; for instance, that such a woman has committed adultery,—Would a court of justice try the adultery in an action upon such a wager? Or a wager that an unmarried woman has had a bastard,—Would you try that? would it be endured? Most unquestionably it would not. Because it is not only an injury to a third person, but it disturbs the peace of society; and in either of these two last cases the party to be affected by it would have a right to say, How dare you bring my name in question? If a husband complains of adultery, he shall be allowed to try it, because he is a party injured. So if it be necessary to justice, to try whether such a one is a bastard, it shall be tried. But third persons, merely for the purpose of laying a wager, shall not thus wantonly expose others to ridicule, and libel them under the form of an action.

"We then come to the present case, which is shortly this: Here is a person who appears to all

the world to be a man; is stated upon record to be "Monsieur le Chevalier d'Eon;" has acted in that character in a variety of capacities, and has his reasons and advantages for so appearing. Shall two indifferent people, by a wager between themselves, injure him so, as to try in an action upon that wager, Whether (as was said in the argument) he is a cheat and impostor? or shew that he is a woman.—and be allowed to subpœna all his intimate friends and confidential attendants to give evidence that will expose him all over Europe? It is monstrous to state; it is a disgrace to judicature; and if the Chevalier, by application to the Court, or otherwise, had come and said, "Here "is a villanous wager, laid to injure me; I pray the "Court, as a third person whose interest it affects, "to stop it,"—the Court would instantly have done it, upon the same principle as the Court stayed the proceedings, upon the application of Mr. Muilman, in the case Coxe v. Phillips (*a*). Wherever a question arises upon a real matter of right, though the interest of third persons, not parties, may be affected by it, it shall be tried. If a witness lays a wager upon the subject-matter in dispute between a third person, it does not affect his evidence so as to defeat either party of it.

"I think the other ground is material. The question is upon the sex of a person, to the ap-

(*a*) Cas. Temp. Hardwicke, 237.

pearance of all the world a man; and who, for reasons of his own, thinks proper to keep his sex a secret.

The medium of proof upon such a question, must arise from the circumstances that distinguish the sexes. This necessarily tends to introduce all the indecent evidence such an enquiry can involve. Suppose two persons were to lay a wager upon a mark or defect in a woman's body,—Would the Court say they would suffer her chambermaid to be called, to give evidence upon such a question? The case mentioned in the argument, of an insurance of two sons upon the lives of their respective fathers, and other cases where the life of one person is run against another, are not cases that injure or affect the individuals who happen to be made the subject of such wagers; they are no reflection or injury to them. So a wager, whether the next child shall be a boy or a girl, hurts no one. But the present case is indecent in itself, and manifestly a gross injury to a third person; therefore ought not to be endured. We think the objection appears sufficiently upon the record, and that there is ground enough upon these allegations to arrest judgment."

The three other Judges concurred;

And the Court arrested the judgment.

The very same day (*a*) on which the last case was decided, a *policy* on the sex of a person was held to be a *wagering policy*, and determined to be void, on stat. 14 Geo. 3 (*b*).

Where wagers may be made a cover to hide an illegal transaction, as bribery, simony, or usury, &c. they shall be illegal, on account of their evil tendency, and their infringement of the rules of sound policy.

On this account the Court of K. B. (*c*) would not suffer a wager to be recovered which was made under the following circumstances; which, as stated in the special case, were these:

"That the borough of Southwark sends two members to Parliament; and that on the 22d of June 1784, there was a vacancy in the room of Sir Barnard Turner. That Mr. Le Mesurer and Sir Richard Hotham were candidates for the said borough; that the plaintiff and the defendant were *voters* and partizans of the respective candidates, and had canvassed and taken decided parts on opposite sides, the plaintiff being for Mr. Le Me-

(*a*) Roebuck *v.* Hammerton, Cowp. 737.
(*b*) c. 48.
(*c*) Allen *v.* Hearn, 1 T. R. 56.

surer, and the defendant siding with Sir Richard Hotham, before the bet was made. That the bet stated in the first count of the declaration, was made before the poll began; and both parties voted for their respective friends, and solicited other voters. That Mr. Le Mesurer was duly elected, and returned as member for the said borough at the said election."— And Lord Mansfield, in giving his judgment here too, says, "If this be allowed, every other wager may be allowed. But this is not all: a gaming contract should not be encouraged, if it has a *dangerous tendency*. What is so easy as, in a case where a bribe is intended, to lay a wager? It is difficult to prove that the wager makes him give a contrary vote to what he would otherwise have done; but still it is a colour for bribery; it has an influence on his mind. Therefore, in the case in (*a*) Cowper, if the wager had been laid with a Lord of Parliament, or a Judge, it would have been void from its *tendency*, without considering whether a bribe was really intended or not. This is of that nature, and therefore void."

In the above case, another (*b*) was cited, and preserved in the notes of the reporter; which seems not to be found elsewhere. It was a wager, that

(*a*) Jones *v.* Randall, Cowp. 37.
(*b*) Foster *v.* Thackery, 1 T. R. 57, (n. b.)

war should be declared against France within three months. The opinion of the twelve Judges was taken on the point. Whether that wager was void, under stat. 14 Geo. 3, c. 48.? The Courts of B. R. and C. B. were of opinion that it was; and the Court of Exchequer that it was not. But no judgment was ever given on the case.

From this short note of the case, it does not appear whether this was a *wager* merely, or a *wagering policy*. If it was a wager merely, it seems difficult to bring it under the purview of the stat. 14 Geo. 3, c. 48, since the words of that act extend to *policies* only.

The principle of sound policy has been extended so far, that, in this case (*a*), a wager, "That the "amount of the hop-duties for the year 1786 "would be greater than the collection the year "before," was held to be bad. And the principal reason for that determination seems to be, that the decision of the wager leads to an improper disclosure of a branch of the revenue.

And, indeed, it seems to have been carried to its utmost limit, when, in the case of Shirley *v.* Sankey (*b*), it was determined, that a promissory-note, given for the amount of a wager (on hop-duties) which had been decided, would not support an action.

(*a*) Atherfold *v.* Beard, 2 T. R. 610.

(*b*) 2 Bos. et Pull. 130.

Mr. J. Ashurst, Mr. J. Buller, and Mr. J. Grose, (Lord Mansfield being absent) in the former case, all concurred in holding that to be an illegal wager; and Mr. J. Buller gives his reason for so holding it in these words: "This is the "case of an idle wager between two persons, who "have no concern in the subject, to draw into "question a matter that respects the interest and "general importance of the country; and *on that* "*ground I think that the wager is illegal.*" In this judgment he seems to hint an opinion, that the stat. 14 Geo. 3, c. 48, extends to *wagers* as well as *policies;* for further he says (*inter alia*) "I "incline to think, with the opinion of this Court (*a*) "and that of the Common Pleas, that the stat. "of 14 Geo. 3 would reach the present case; for "though the statute speaks only of policies, yet I "think it may extend to cases like the present: "for either the Courts must restrain that act of "Parliament to such cases as *in form* are policies, "which would entirely repeal the statute; or, by "pursuing the spirit of the act, extend it to all "cases. I think the latter is the true construction; "for a policy is nothing but a promise: and it "would be strange to determine that the party "might do the same thing in one form, which the "statute has expressly prohibited to be done in "another." But it is to be observed, that this

(*a*) In Foster *v.* Thackery.

point was not judicially before the Court; nor was it decided in Roebuck v. Hammerton; for there the parties themselves described the contract as a *policy*.

It is to be observed also, that in the preceding case, and others of the same cast, the wagers have been held legal or illegal, as they have or have not fallen within the rule first laid down.

And still keeping the same principle in view, we find that a wager upon a contract between two private persons is allowable. For here the wager was (*a*), Whether A. had bought a waggon of B. or not? which was determined, after a solemn argument, to be a good wager; and the plaintiff recovered.

However, in this last case, the effect of the 14th Geo. 3, c. 48, upon wagers, did come under the consideration of the Court; for it was objected, in a motion for arresting the judgment, that the plaintiff had no interest in the subject-matter of this wager. The statute requires that no policy shall be made upon lives or other event, wherein the person for whose benefit the same is made shall have no interest, "or by way of gaming or "wagering." In this case, Mr. J. Grose and Mr. J. Ashurst were of opinion, that the statute did not extend to cases of mere wagers; and the former

(*a*) Good v. Elliot, 3 T. R. 693.

expresses himself thus distinctly (*a*): "If the "Legislature had intended to make all wagers "void, it is extraordinary that the statute did not "enact, *That all and every wager and wagers, "upon any event in which the person making the "wager shall have no interest, shall be void.* It "has been said, indeed, that such is the meaning "of the words by way of *gaming or wagering:* "but to put such meaning on those words, would, "in my opinion, be to torture the plain sense of "plain words."

Mr. J. Ashurst was of the same opinion; and Lord Kenyon says, "As to the second point, "namely, Whether the wager is void by the stat. "14 Geo. 3? I cannot but think that that act of "Parliament relates wholly to policies of insur- "ance; and, as my brother Grose has said, it "would be strangely distorting the meaning of "words to suppose that such a wager as the pre- "sent could be within the meaning of the Legis- "lature; for, from the words used in the second "clause, it is apparent that they had *written in- "struments* only in contemplation, by requiring "the names of the parties interested to be inserted "therein. It seems to me extremely clear, that "the act was meant to be confined to policies of "insurance. I should be glad to go as far as I

(*a*) 3 T. R. 696.

" could, to put a stop to the mischief arising from " this species of gambling by wagers; but that " would be, in my opinion, to make law; and " those mischiefs, therefore, must be left to the " correction of the Legislature, whenever they " think proper to apply a remedy."

Mr. J. Buller, however, differed from the other three Judges, and adhered to his opinion hinted in Atherford and Beard.

These are the principal, if not all, the cases where the legality or illegality of particular wagers have been determined; but this chapter cannot be concluded without taking notice of the stat. of 9 Ann, chap. 14 (*a*), which (by § 2.) enacts, that " Any person or persons whatsoever, who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by BETTING on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole the sum or value of ten pounds, and shall pay or deliver the same or any part thereof, the person or persons so losing and paying or delivering the same, shall be at liberty within three months then next, to sue for and recover the money or goods so lost and paid or delivered, or any part thereof, from

(*a*) 9 Ann, c. 14.

the respective winner and winners thereof, with costs of suit, by action of debt founded on this act, to be prosecuted in any of her Majesty's Courts of Record; in which actions or suits no essoign, protection, wager of law, privilege of Parliament, or more than one imparlance shall be allowed," &c. — Upon this statute it has been decided, that the person upon whom the betting was, must be playing at some game, and stated so to have been,

Where the bet was (*a*), "That A. B. could not "run four miles in 21 minutes and an half;" this bet was held not to be affected by the statute; because it appeared that A. B. did not know of the bet, and did not exert himself to decide it; or more properly, the contrary did not appear; and the Judges said, he might be going a message, or running for exercise or amusement; and this being a penal act, nothing shall be intended.

In the case of Ximenes *v.* Jacques (*b*), where the wager was, "That the plaintiff could perform a journey of 240 miles, in a post-chaise and pair of horses, in 24 hours," the Court held it to be illegal as against the statute; for here there was a *playing;* that is, the person who was to do the

(*a*) Lynal *v.* Longbothom, 2 Wils. 36.
(*b*) 6 T. R. 499.

act betted upon, was connusant that he was doing it for the purpose of deciding a chance laid upon him, and therefore within the mischief of the act.

But, however, if the wager arises from matter collateral to the game (as the rules of the game, and not the game itself) it is not within the act: thus a wager (*a*), Whether, in a certain situation, the player was bound to move a man at Backgammon? And the reason seems to be, that these wagers are not decided by the event of the game.

It will be scarcely necessary to add, that a wager arising out of an illegal transaction, shall be itself illegal; and it has been so determined in Brown *v.* Leeson (*b*), where the wager was, "How many "ways there were of nicking seven on the dice," the parties being playing at Hazard. Hazard being an illegal game (which Backgammon is not: see 13 Geo. 2, c. 19, § 9.) a bet upon the rules of it even shall be bad.

Having considered what wagers are good, and what are not, and having endeavoured to sift out, as it were, a general rule, I will proceed to consider the situation of a third person frequently concerned in matters of this kind; namely, the stakeholder.

(*a*) Pope *v.* St. Ledger, Salk. 344.
(*b*) Brown *v.* Leeson, 2 H. Blac. 43.

CHAPTER II.

OF THE STAKE-HOLDER.

THE Stake-holder is the person in whose hand the parties deposit their respective shares or stakes in a wager or bet, in order that he should pay both sums to him who wins. Hence, having no interest in the thing himself, he is a mere trustee for the security of both parties. As his duty is plain, so the law concerning him is simple, and the cases few.

It has been holden (*a*), that where the money was paid to a stake-holder on the event of a boxing-match, and the matter never decided (though the battle was in fact fought) each party might recover back his stake. And though this was argued to have been paid on account of an illegal transaction, the Court did not seem to think that objection sufficient.

The next case is that of Lacaussade *v.* White (*b*), which is thus stated by the Reporters: "This was "an action of *assumpsit*, on an agreement made "on the 11th of January 1797, by which *the de-*

(*a*) Cotton *v.* Thurland, 5 T. R. 405.
(*b*) Lacaussade *v.* White, 7 T. R. 535.

" *fendant*, in consideration that the plaintiff *had* " *paid him* 100*l.*, agreed to pay the plaintiff 300*l.*, " 'If articles forming the basis of a peace, and " signed by some official characters, by which " hostilities would cease, and would not recom- " mence, were not settled between England and " France on or before the 11th of Sept. 1797.' " The declaration also contained the common mo- " ney counts. On the trial, at Westminster Sit- " tings, before Lord Kenyon, C. J. it was admitted " that the wager was illegal, and that the plaintiff " could not recover on the special count; but, by " the direction of the learned Judge, the plaintiff " had a verdict for the 100*l.* paid *by him to the* " *defendant*."

On a motion to set aside the verdict, the Court held the direction right.

In this report there seems to have been a mistake; for by it, it appears that the defendant was a party to the bet, and the deposit in his hands was, in fact, the consideration of the contract. If this was really the case, he stands in a very different situation, and would come under the rule, *in pari delicto, potior est conditio possidentis;* for he is then *particeps criminis;* and I very much doubt whether the plaintiff could recover under such circumstances. The words of Lord Kenyon, in a subsequent case, are very strong in support of my

opinion; for he says, in Howson *v.* Hancock (of which case I shall soon take notice) "But there "is no case to be found where, when money has "been actually paid by one of two parties to the "other upon an illegal contract, both being *par-* "*ticipes criminis*, an action has been maintained "to recover it back again."

And in his judgment there, speaking of the case of Howson *v.* Hancock, he observes: "This is "very different from the case of Lacaussade *v.* "White, where the money *was recovered from the* STAKE-HOLDER before it had been paid over." So that the real point determined in Lacaussade *v.* White, seems to be this: That if an illegal wager be laid, and money deposited with the stake-holder, the loser may recover his money of the stake-holder even after the wager is determined against him, provided it is not actually paid over to the winner.

But it was positively determined (*a*), that if the money so deposited in a stake-holder's hands, on an illegal wager, had been paid to the winner by the loser's direction, or with his consent, the loser shall not recover back that money from the winner. For here the rule applies again; they are both in

(*a*) Howson *v.* Hancock, 8 T. R. 575.

pari delicto, and therefore *potior est conditio defendentis.*

If the money deposited in the hands of a stake-holder be paid over to the winner, this is not a conversion in the stake-holder, and he cannot be charged for it in trover; but an action of trover will lie against him, if he converts the money to his own use (*a*).

If the money is deposited with a banker (*b*) as a stake-holder, in the joint names of A. B. who have made a bet, the winner cannot get it from the banker without the consent of the other. And, in such case, if the winner bring an action for the stake against the loser, he must lay in his declaration, and prove in evidence the money's having been paid into the banker's hands, and his refusal to suffer him to receive it. On this account the plaintiff was nonsuited.

These are all the cases that have been decided on points respecting the stake-holder, in which he is considered as a person without interest in the thing entrusted to him, either absolute or contingent; and having no such interest, is not considered as a *particeps criminis*, even if the wager be illegal.

(*a*) Ledesham *v.* Lubram, Cro. Eliz. 870.
(*b*) Robson *v.* Hall, Peake, N. P. Ca. 127.

CHAPTER III.

OF HORSE-RACES.

AS Horse-racing is an amusement peculiarly attended to by the gentlemen of this country, and is not prohibited by our law, I have thought the consideration of it sufficiently important to assign to it a chapter by itself. The benefits which have been derived to our country by the improvement in the breed and management of horses, have induced the Legislature to put the amusement of horse-racing under certain regulations; and when those regulations are complied with, it receives a certain protection: and the reason of this was the improvement of the breed of horses, as is evident from the preamble of the statute of 13 Geo. 2 (*a*), which recites, That by horses running for small plates, &c, "*the breed of strong* "*and useful* horses hath been much prejudiced; "for remedy thereof," &c. clearly shewing what the object of the Legislature was. I shall, however, before I consider this statute, state such cases and acts of Parliament as materially affected the practice of horse-racing before it was passed. In the 16th Car. II. (*b*), the object of which

(*a*) c. 19. (*b*) c. 7, § 2.

was to prevent "*deceitful, disorderly, and exces-*" "*sive gaming*," horse-races are enumerated as one of the games in which unfair dealings shall incur the punishment there laid down. But as this clause will be more fully explained in a subsequent chapter, I only mention it here for the purpose of shewing that this particular kind of gaming is included in it.

For the same purposes also, the statute of 9 Ann (*a*), will reach to horse-racing; though, I apprehend, that securities given for money won at a horse-race, where the stake is more than 50 *l.* would not be void; because, as the race itself is made lawful, under those circumstances the consequences would be so too.

The principal act which regulates this sort of play, is the 13th Geo. II. c. 19; and of this I shall take particular notice, and of the cases which have arisen out of it. It is enacted by section 1, That "no person or persons whatsoever shall enter, "start, or run any horse, mare, or gelding, for any plate, prize, sum of money, or other thing, unless such horse, mare, or gelding shall be truly and *bona fide* the property of and belonging to such person so entering, starting, or running the same

(*a*) c. 14.

horse, mare, or gelding; nor shall any one person enter and start more than one horse, mare, or gelding, for one and the same plate, prize, or sum of money, or other thing; and in case any person or persons shall, after the said twenty-fourth day of June, One thousand seven hundred and forty, enter, start, or run any horse, mare, or gelding, not being the property truly and *bona fide* of such person so entering, starting, or running the same for any plate, prize, sum of money, or other thing, the said horse, mare, or gelding, or the value thereof, shall be forfeited, to be sued for and recovered, and disposed of in manner as is hereinafter mentioned; and in case any person or persons shall enter and start more than one horse, mare, or gelding, for one and the same plate, prize, or sum of money, or other thing, every such horse, mare, or gelding (other than the first entered horse, mare, or gelding) or the value thereof, shall be forfeited."

Section 2 enacts, That "no plate, prize, sum of money, or other thing, shall be run for by any horse, mare, or gelding, or advertized, published, or proclaimed to be run for by any horse, mare, or gelding, unless such plate, prize, or sum of money, shall be of the full, real, and intrinsic value of fifty pounds, or upwards; and in case any person or persons shall, from and after the twenty-fourth day of June, One thousand seven hundred and forty, enter, start, or run any horse, mare, or gelding, for

any plate, prize, sum of money, or other thing, of less value than fifty pounds, or shall make, print, advertize, publish, or proclaim any advertisement or any notice of any plate, prize, sum of money, or other thing, of less value than fifty pounds as aforesaid, to be run for by any horse, mare, or gelding, every such person or persons so entering, starting, or running such horse, mare, or gelding, for such plate, prize, sum of money, or other thing of less value than fifty pounds as aforesaid, shall forfeit and lose the sum of two hundred pounds." This section also inflicts the penalty of 100*l.* on any person who advertizes a smaller prize than 50*l.*

By section 3, "Five-year-olds were to carry ten stone; six-year-olds eleven stone; and seven-year-olds twelve stone, on pain of 200*l.*" But this is repealed by 18 Geo. 2 (*a*); and now horses of any age may carry any weight, at the option of the parties; for it was judged that the high prices given for horses of size and strength, was sufficient encouragement to breeders, without laying this restriction on the owners of running horses.

By section 4, the race must begin and end in the same day.

(*a*) c. 34, § 11.

By section 5, no match shall be for less than 50 *l.* unless run at Newmarket, or at Blackhambleton in Yorkshire, under the penalty of 200 *l.*

By section 7, all the entrance-money shall be paid to the second best horse which shall run for the plate or prize.

By section 8 it is provided, that that act shall not extend to prevent horses running for a plate or prize issuing out of lands or money appropriated for that purpose.

The other sections of this act affect other species of gaming, and direct the manner in which the penalties shall be levied.

The principal cases which have been determined upon horse-races, have arisen either since this statute, or out of it. In a note to 1 Lord Raymond, 89, the following case (*a*) is stated:—A. covenanted with B. that the horse of A. should run with the horse of B. four heats, for 30 *l.* each heat; and in covenant brought for 120 *l.* having won every heat, the defendant pleaded the (*b*) statute of gaming; and upon demurrer it was objected, that this was not within the statute; because the running

(*a*) Called Rosington's Case, 3 Salk. 175.
(*b*) 16 Car. 2, c. 7.

of each heat for 30*l.* was a distinct and single wager; and then, being but for 30*l.* the statute did not extend to it, the sum prohibited by the statute being 100*l.* or more. But it was adjudged that it was void for the whole; for it was but one entire and single contract, though the horses were to run four times; and then the sum won amounting to 120*l.* it was expressly prohibited by the act.

Though this case, as must be observed, happened before the passing of 13 Geo. II, yet the principle of the entirety of the contract will still apply.

Horse-races have always been considered (*a*) as gaming, and within the statutes against gaming, before this act and since, when they are run for less money than is thereby allowed; and a bet upon them was here considered as illegal, because the thing out of which it arose was so. It is material to observe, too, that the person making the bet was not the *owner* of the mare to run; and therefore this was not within the protection of the statute. For in a note to Strange's Reports, 3d edition, the bet is stated to have been, "That the "mare of one B. beat the defendant's mare;" and the statute speaks only of "owners."

(*a*) Goodburn *v.* Marley, 2 Stra. 1159.

And where the wager was 14 guineas to 8 (*a*) with the Defendant, upon two races to be run by two horses, E. and G; that E, would win one of the races;—after verdict, it was moved in arrest of judgment, that laying above 10 *l.* upon a horse-race is a bet against the statute of gaming, if the statutes of 16 Car. II, c. 7, and 9 Ann. c. 14, be to be taken together; for the defendant could not have recovered 14 guineas; therefore the plaintiff should not be allowed to win the 8 gs. And of this opinion were the whole Court; and the judgment was arrested. The Court also said, they ought to extend the 9th Ann, to prevent excessive bets upon all sports as well as games; and that although hore-racing is not mentioned in that statute, yet it is within the general words, *other game or games.*

Under this act of Parliament, a match of 25 *l.* a side is a match for 50 *l.* (*b*), and that even if one of the parties should pay the other 5 *l.* to induce him to run his horse; whereby, on his side, only 20 *l.* was dependent upon the event of the race. This match was made by a written agreement; and, in fact, the action was brought for a sum forfeited by not running, and not for a sum won; for the facts were thus:—"The agreement was, that each should "start his mare; and that if either should refuse

(*a*) Blackston *v.* Pye, 2 Wils, 309.
(*b*) Bidmead *v.* Gale, 4 Bur. 2132

" or neglect, he should forfeit and pay 25 *l.* to the " other. So that it was a match for 25 *l.* a side, " play or pay. But the plaintiff was to pay the " defendant 5 *l.* before-hand, as a consideration " to induce him to make the match. The defend- " ant afterwards refused to run the match: where- " upon the plaintiff brought this action against him " for the 25 *l.* and assigned the *breach of covenant* " in the defendant's not starting his mare."

From this statement of the case, which is taken literally from Sir James Burrows's report of it, it appears that two points were settled; first, That a match of 25 *l.* a side is a match for 50 *l.* within the act; and, secondly, That where the match is legal, and the parties subject themselves to a penalty for not performing it, that penalty may be recovered from the defaulter; for here the match was lawful (the horses being the property of betters, and the amount of the stake being high enough); and the action was brought for the penalty of non-performance against the defaulter.

It has been before stated, that a horse-race is considered as a game within the statute 9 Ann. (Baxter and Pye, *ante* 43) and therefore a betting upon it to any amount above 10 *l.* is void. In this case (*a*) the bet was ten guineas to five; and the Court held the case here quoted as decisive: for

(*a*). Clayton v. Jennings, 2 Bla. 706.

as the defendant could not have recovered his ten guineas, the plaintiff shall not recover his five. And after a verdict for five guineas in favour of the plaintiff, the Court arrested the judgment.

Where the race is in itself illegal, any bet upon the event of it, though under the sum of 10*l.* is illegal also, as was determined in this case (*a*). The stake for which the horses were running was under 50*l.* and therefore, by the 13th Geo. II, c. 19, illegal; and the bet was held to be so too: and this principle has been since held to be right; for the case of Brown *v.* Leeson was determined upon the same ground. (See *ante*, page 22.)

On the seventh section of the act the following decision has taken place respecting the payment of the entrance-money to the second best horse (*b*).

It was an action for money had and received, tried at Northampton, before Mr. Justice Wilson, at the summer assizes 1788, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

On the 17th of August 1786, an advertisement appeared in the Racing Calender, giving notice, that on the 29th of that month "a gentleman's

(*a*) Johnson *v.* Bann, 4 T. R. 1.
(*b*) Dowson *v.* Scriven, 1 H. Blac. 218.

" subscription purse of 50*l.* would be run for in " Northampton Field, by any horse, &c. to pay " 5*s.* entrance; and if a subscriber, to pay one " guinea; or a non-subscriber to pay three guineas, " into the hands of the clerk of the course (the " defendant) or double at the post," &c.

" The entrance-money each day to the second " best horse; and to run according to such articles " as shall be produced at the time of entrance.

" No less than three reputed running horses to " start each day. If but one horse enter for the " gentleman's purse, to have 10*l.*; if two, eight " guineas each. If but one enter for the Town-" purse, to have 10 guineas; if two, five guineas " each, and their entrance-money again. The " winner each day to pay two guineas to the clerk " of the course," &c.

In consequence of this advertisement, the plaintiff sent a horse to be entered. At the time of the entrance, the articles for the regulation of the course were referred to; which, amongst other things, directed the horses " to carry weights, and " observe every article expressed in the advertise-" ment. The second best horse to have the stakes, " being the crowns paid for entrance."

Three other horses were entered, besides that of the plaintiff; and the owner of each paid at the

entrance 5 *s.* and three guineas into the hands of the defendant, as clerk of the course. The race was run, and the plaintiff's horse was second best; whereupon the Defendant tendered him 1 *l.* as the entrance-money, being five shillings for each horse. But the plaintiff insisted that he was entitled to the 12 guineas paid into the hands of the defendant; *i. e.* three guineas for each horse.

Lord Loughborough. The plaintiff in this case founds his right to recover on the advertisement; by the terms of which each horse was to pay five shillings entrance, and one guinea if a subscriber; if a non-subscriber, three guineas. This advertisement refers to certain articles, which are called in to explain it. But the validity of them depends on the act of Parliament; the parties cannot put a sense on the articles repugnant to the law. I do not think it a question of grammatical construction; by whatever name the money is called, it was in fact entrance-money, since it was necessary to be paid, in order to enable the horse to start. Now the act directs, That the entrance-money shall be paid to the second best horse; but the act would be evaded if this were holden not to be entrance-money, and the articles were to give a different sense to the advertisement.

Gould, J. of the same opinion.

Heath, J. of the same opinion.—If the three guineas in the advertisement were explained by the articles not to be entrance-money, there would be a fraud on the act, which has been construed so strictly, that where a cup of 50 *l.* value was to be run for, it was holden that the value must be exclusive of the workmanship. Besides, the second best horse was to have a prize; but if this were not entrance-money, the prize would be, that he would pay three guineas, and win only twenty shillings.

Wilson, J. If we construe these articles to mean, that the three guineas for each horse were to be deducted from the subscription to make up the 50 *l.* plate, we should make the parties to the penalties to the amount of 200 *l.* We must therefore take it, they intend to do what the law allowed.

Postea to the plaintiff.

The statute of 13 Geo. III. is exclusively applicable to races run by horses *bona fide* the property of the person who makes the stake or prize run for. And in this case (*a*), where the action was for a wager of 100 guineas, "That the plaintiff would perform a journey of 240 miles, in a post-chaise and a pair of horses, in 24 hours, being allowed to change post-chaises and horses as

(*a*) Ximenes *v.* Jacques, 6 T. R. 499.

often as he pleased; but the expenses were not to exceed the usual sum paid per mile for a post-chaise and pair on the post-roads. After a verdict for the plaintiff, it was moved in arrest of judgment, that this was an illegal wager, being a horse race against time, and void by the statutes 16 Car. II, c. 7, and the 9th Ann. c. 14. The Court were of this opinion, and the judgment was arrested; and the grounds of their opinion seems to have been, that the act of 13 Geo. II. extended only to *bona fide* horse-racing.

And indeed the Court of Common Pleas, in conjunction with the K. B. has gone great lengths in bringing cases within this act of aPrliament; for here (*a*) the wager was, "Mr. Pajot bets Mr. "William Whaley 500 guineas and a dinner (to "be had at Sittingbourne in Kent) that his (Mr. "Pajot's) brown horse, called Little Devil, goes "from London to the said town in the said county "of Kent, (rode also by himself) sooner than Mr. "William Whaley's two hacks (one, a brown, "called Billy, and the other a dark bay, called "All-steel) go the same distance; the two horses "of Mr. W. Whaley to be placed at any distance "from each other that he Mr. W. Whaley may "think proper, but to be obliged, one of them, to "arrive in the town of Sittingbourne sooner than

(*a*) Whaley v. Pajot, 2 Bos et Pul. 51.

" Mr. Pajot's horse. Mr. W. Whaley has the " power of naming his rider. The meaning of this " bet is, that Mr. Pajot bets Mr. W Whaley that " his (Mr. Pajot's) horse can go the distance above " mentioned in a shorter time than Mr. W. Wha- " ley's horses above mentioned, placing one of " them at a certain distance from the place from " whence the other starts."

(Signed) W. Whaley.
Pajot.

On this agreement was the following indorsement. N. B. " To start p. p. in fifteen days from " this date."

After the plaintiff had obtained a verdict, it was moved, in arrest of judgment, that it was an illegal wager; and in support of this it was contended, that the race was not a race within the meaning of the 13th Geo. II, which intended only horse-races in the common popular sense of the word, and exclusively meant to be understood as to races run by horses bred for that purpose, and at the usual race-grounds.

There was no doubt here as to the weight carried by the horses, or the place where it was to be run, those things being left to the parties by 18 Geo. II, c. 34, § 11; and the single question was, Whether this was the kind of race meant to be pro-

tected by 13 Geo. II; and it may be useful to give the judgment of the Court at length, which was thus delivered by Lord Eldon: —

"The Court wishes to have this case argued again on that point which seemed to come rather by surprize upon the plaintiff's counsel; namely, Whether this transaction, which is called a horse-race, be a match or race within the meaning of the 13th and 18th Geo. II? It is the more material that this question should be again discussed, because it does not appear from the report of Ximenes *v.* Jacques to have been there considered; and yet a race with a post-chaise and pair is hardly to be deemed a less race in the popular sense of the word than such a race as the present one on the high road from London to Sittingbourne. The 16th Car. II, c. 7, in the second section, prohibited various species of gaming, horse-racing, foot-racing, &c. under certain penalties. After this, 9 Anne, c. 14, also prohibited various species of gaming, under heavy penalties; and though horse-racing was not named in that statute, yet it has been holden to come within the spirit of it. The 16th Car. II. does not, in terms, avoid any contract; but the transaction on which the contract is founded being prohibited, the contract itself cannot be supported. The 9th Anne expressly avoids the contract. These statutes were followed by 13 Geo. II, c. 19, and 18 Geo. II,

c. 34 (*a*). Had many contracts founded in horse-racing been held illegal previous to the statutes, it might be found difficult to maintain that such horse-racing could now be deemed legal which before had been deemed illegal. But the 13th Geo. II. having prohibited many species of horse-racing, the law seems to have implied that such species of horse-racing as were not prohibited by that statute, by not being prohibited, became legal. And the 18th Geo. II. having taken away some of the prohibitions and penalties of the 13th Geo. II, the same kind of reasoning seems to have been applied; namely, that this species of racing, with respect to which certain restrictions were taken away, was thereby altogether legalized. There seems to be much ground for arguing from the nature of the 16th Car. II, and 9 Anne, that these acts ought to be construed strictly, in order to enforce the principle on which they are founded, namely, to prohibit all horse-racing; and that the 13th and 18th Geo. II. are from their nature to be so construed as to encourage the breed of horses, and to permit the species of horse-racing only, called *Racing on the Turf*, it is to be observed, that the 13th Geo. II. speaks of entering, placing, starting, &c.; and that the expression, "any place "or places whatsoever," used in the 18th Geo. II, "can hardly mean all England."

(*a*) 13 Geo. 2, c. 19. 18 Geo. 2, c. 34.

In consequence of this intimation from the Court, the case stood over for further argument; but on this day,

Lord ELDON, Ch. J. said, "Upon enquiry of the Judges of the Court of King's Bench, we find that the judgment of that Court in Ximenes *v.* Jacques proceeded on an opinion that the 13th and 18th Geo. II. relate to *bona fide* horse-racing only. Without, therefore, again entering into the grounds before stated, it is sufficient for me to declare it to be the opinion of the Court, that the transaction described in this case, is not that species of horse-race or match which is legalized by the 13th and 18th Geo. II; and consequently that this action cannot be maintained.

Though these two cases have determined that no race is within the act but *bona fide* horse-races, yet they seem to militate against the case of Robson *v.* Hall (*a*), where the race was thus: — The defendant "betted the plaintiff 150*l.* to 100*l.* that he "did not find two geldings to trot 32 miles in two "successive hours, carrying the said Mr. Robson, "and no one else." By indorsement (the contract being on a proper agreement-stamp) the bet was doubled. The plaintiff performed the trotting in two successive hours; but in the following man-

(*a*) Robson *v.* Hall, Peake's Cas. N. P. 127.

ner: He trotted one horse twelve miles, then he trotted the other four miles, turned back to the place where he left the first horse, and completed the match by again mounting that horse, and trotting him twelve miles more. It was objected: that he ought to have trotted *each horse* sixteen miles without stopping. But Lord Kenyon said, the true meaning of the agreement was, that the plaintiff might trot the two horses the distance, and in the time agreed upon, in any manner he thought proper.

The plaintiff in this action did not recover, as the action had not been properly brought; but no objection was made to the contract as illegal; nor did the Court intimate an opinion that it was. But I think, that after the decision in the two last cases of Ximenes *v.* Jacques, and Whaley *v.* Pajot, the Court would not suffer a winner to maintain an action on such a contract as this.

CHAPTER IV.

OF GAMES.

WE now come to that part of our enquiry in which we are to take notice of what games themselves are lawful, and what are not. And here it may be observed, that it appears rather arbitrary to say, that a man shall not do such or such things, which, in fact, are not *mala in se*, for his amusement; or that he shall not go to such or such a house, to enjoy those amusements which he cannot have at home. But the answer to that is this: The law does not prevent a man from the enjoyment of an innocent amusement; but its object is to prevent him from doing it, when it may tend to disturb the public peace, or to become a vice by too frequent or too general a use of it. And, in considering this subject, I shall be obliged to divide the chapter into two sections, which, though strongly connected with each other, are matters very essentially different in many particulars. The first section I shall keep entire to the simple question of, What is and what is not a legal game? The second will be occupied by the consideration of the incidents arising out of the play, rather than

the play itself; such as homicide or assaults happening in consequence of the play, &c. And, first,

Section I.

Of Games which are legal, and those which are not.

In the first place, then, it appears, that by the ancient common law *all* games were lawful; as will be more particularly noticed hereafter. But so early as the reign of Richard the Second did the Legislature find it necessary to interfere, and, by the 12th Rich. II (*a*), made several games illegal, as "Coytes, dyces, gettre de pere, keyles, et au-"tres tielx jeues importunes." But this was only aimed at labourers and artificers; and was repealed by 21 James I (*b*). The next statute was 11 Henry IV (*c*), which inflicted six days imprisonment on the offenders against the 12th Richard II; this was also repealed by 33 Hen. VIII (*d*). But these are only cited to shew at what an early period the attention of the Legislature was called to these subjects. And the 17th Ed. IV (*e*) was also enacted, prohibiting "Cloish, kayles, half-"bowles, hand in and hand out, and check-"board;" and imposes a penalty of two years imprisonment and a fine; and complains that these games were the cause of "divers and many mur-"ders, robberies, and other very heighnous felo-

(*a*) c. 6. (*b*) c. 28, § 11.
(*c*) c. 4. (*d*) c. 9. (*e*) c. 3.

"nies." By 11 Hen. 7 (*a*), labourers and artificers are prohibited from playing at unlawful games but in Christmas; and by 19 Hen. VII (*b*), certain persons are prohibited from playing at games. But the principal object of these early statutes was to encourage archery, and to make that the only lawful sport for the lower ranks of people.

But the earliest of the acts against gaming now in force, is the 33d Hen. VIII (*c*), in which, by § 11, persons keeping any "common house, alley, "or place of bowling, coyting, cloysh, cayls, "half-bowl, tennis, dicing-table, or carding, or "any other manner of game prohibited by any "estatute," without a placard (or licence) to "forfeit 40 *s.*; and, by § 16, "Artificers, crafts-"men of any handicraft or occupation, husband-"men, apprentices, labourers, servants at hus-"bandry, journeymen, or servants of artificers, "mariners, fishermen, watermen, or any serving-"men," are not allowed to "play at the tables, "tennis, dice, cards, bowls, clash, coyting, lo-"gating, or any other unlawful game, out of "Christmas." And the principal provisions of this act are made for the encouragement of the manufacture and use of bows and bow-staves.

(*a*) c. 2. (*b*) c. 12. (*c*) c. 9.

The preamble to the 10th and 11th W. III (*a*), recites, that "Whereas several evil-disposed persons, "for divers years last past, have set up many mis-"chievous and unlawful games, called lotteries," &c. goes on to state, that they have been the means of impoverishing and ruining many families; for remedy whereof, enacts, adjudges, and declares, That all such lotteries, and all other lotteries, are publick nuisances, and all patents and grants for such lotteries are void.

And, by section 2, for the punishment of persons keeping or opening lotteries, it enacts, that "No person or persons whatsoever shall publickly or privately exercise, keep open, shew, or expose to be plaid at, drawn at, or thrown at, or shall draw, play, or throw at any such lottery, or any other lottery, either by dice, lots, cards, balls, or any other numbers or figures, or any other way whatsoever; and that every person or persons that shall, after the said nine-and-twentieth day of December(*b*), exercise, expose, open, or shew to be plaid, thrown, or drawn at, any such lottery, play, or device, or other lottery, shall forfeit for every such offence the sum of five hundred pounds;" which may be sued for by a common informer; and one-third is given to the King, one-third to the poor of the parish in which the offence is com-

(*a*) c. 17. (*b*) 1699

mitted; and the remaining third to the informer. The player also is subject to a very severe penalty; for the third section of the act ordains, "That every person or persons that shall play, "throw, or draw at any such lottery, play, "or device, or other lottery, shall forfeit *for* "*every such offence* the sum of 20 *l.*;" to be sued for and divided as the other penalty. But, as we are now more immediately considering that particular species of game called "Lottery," it may not be amiss to consider in this place (though out of its chronological order) the statute of 12 Geo. II (*a*), which is the principal law on the subject of Lotteries, and which, in fact, consolidated all the previous statutes on the subject into one; and is therefore emphatically called the "Lottery Act."

This statute, after reciting the titles and substance of the several acts of the 10th and 11th William III (*b*), 9th Ann (*c*), 10th Ann (*d*), 8th Geo. I (*e*), and 9th Geo. I (*f*), goes on to state, that it is found by experience that the said good and wholesome laws have not effectually answered the good ends, intents, and purposes in and by the said acts designed; but that, contrary to the true intent and meaning of the said recited acts, several deceitful games and subscriptions are daily carried on, under the denomination of sales

(*a*) c. 28. (*b*) c. 17. (*c*) c. 6, § 56.
(*d*) c. 26, § 109. (*e*) c. 2, § 36. (*f*) c. 19.

of houses, lands, plate, jewels, goods, and other things; and that several printers have printed, published, or caused to be printed and published, proposals or schemes for the sale of such houses, lands, plate, jewels, goods, and other things, to be determined by raffles, by mathematical machines, or engines, "and by other indirect ways and means "tending to evade the said good and wholesome "laws before mentioned: and whereas several "persons have for many years past carried on "and set up certain fraudulent games and lotte-"ries, to be determined by the chance of cards "and dice, under the denomination of the Games "of the Ace of Hearts, Pharaoh, Basset, and Ha-"zard, and thereby defrauded several of his Ma-"jesty's subjects, ignorant of the great disadvan-"tage adventurers in the said games or lotteries, "so denominated the Games of the Ace of Hearts, "Pharaoh, Basset, or Hazard, are under, sub-"ject, and liable to; and whereas several doubts "have arisen whether the said games of the Ace "of Hearts, Pharaoh, Basset, and Hazard, are "within the description of the lotteries prohi-"bited by the said recited acts of Parliament; "and whereas great difficulties have arisen upon "the methods of conviction of the offenders against "the said acts of Parliament: for remedy where-"of, and for explaining and making more effectual "the said acts of Parliament," it is enacted, "That if any person or persons shall, after the

" twenty-fourth day of June, One thousand seven " hundred and thirty-nine, erect, set up, continue, " or keep any office or place, under the denomina- " tion of a sale or sales of houses, land, advow- " sons, presentations to livings, plate, jewels, ships, " goods, or other things, by way of lottery, or by " lots, tickets, numbers, or figures, cards, or dice; " or shall make, print, advertise, or publish, or " cause to be made, printed, advertised, or publish- " ed, proposals or schemesfor advancing small sums " of money by several persons, amounting in the " whole to large sums, to be divided among them " by chances of the prizes in some public lottery " or lotteries established or allowed by act of Par- " liament; or shall deliver out, or cause or pro- " cure to be delivered out, tickets to the per- " sons advancing such sums to entitle them to " a share of the money so advanced, according to " such proposals or schemes; or shall expose to " sale any houses, lands, advowsons, presenta- " tions to livings, plate, jewels, ships, or other " goods, by any game, method, or device what- " soever, depending upon or to be determined by " any lot or drawing, whether it be out of a box " or wheel, or by cards or dice, or by any ma- " chine, engine, or device of chance of any kind " whatsoever," — Section 1. Such persons convicted before *one justice of the peace, mayor*, &c. upon the oath of *one* or more credible witnesses, or upon view of such justice, mayor, &c. or his

own confession, to forfeit 200 *l.* to be levied by distress of the offender's goods, by warrant under the hand and seal of *one* or more justices of the peace; one-third of the penalty to the informer, and two-thirds to the poor of the parish where the offence was committed. If the offence is committed "within the city of Bath," the two-thirds are given to Bath Infirmary.

Section 2. And to obviate any doubt that may arise as to what games are within the meaning of that act, the second section declares, "That the "said games of the Ace of Hearts, Pharaoh, Bas-"set, and Hazard, are hereby declared to be "games or lotteries by cards or dice within the "intent and meaning of the said in-part-recited "acts."

By section 3, 50 *l.* penalty is imposed upon the *player*.

Section 4. Sales by such lotteries are made void, and the lands, houses, &c. so sold, are forfeited "to such person or persons as shall sue for the "same."

By section 8, if the offender cannot pay the penalties, the justices may commit him to gaol for six months.

And to return to our prescribed order, of considering these acts, we must recur to the 9th of Ann (*a*): a statute which frequently occurs, and whose operation is very extensive. It is provided by section 2, "That any person or persons whatsoever who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by BETTING on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole the sum or value of ten pounds, and shall pay or deliver the same or any part thereof, the person or persons so losing and paying or delivering the same, shall be at liberty, within three months then next, to sue for and recover the money or goods so lost and paid or delivered, or any part thereof, from the respective winner and winners thereof, with costs of suit, by action of debt founded on this act, to be prosecuted in any of her Majesty's Courts of Record, in which actions or suits no essoign, protection, wager of law, privilege of Parliament, or more than one imparlance shall be allowed."

By the 13th Geo. II. (*b*) it is recited, that "some fraudulent and deceitful games have been "invented, and a certain game, called Passage, is "now daily practised and carried on;" it declares, "that the said game of Passage, and all and every

(*a*) c. 14. (*b*) c. 19, § 9.

" other game and games invented or to be in-
" vented, with one or more die or dice, or with any
" other instrument, engine, or device, in the na-
" ture of dice, having one or more figures or num-
" bers thereon (Backgammon, and the other games
" *now* played within the Backgammon tables, only
" excepted) are and shall be deemed to be games
" or lotteries by dice within the intent and mean-
" ing of the said in-part-recited act." (*i. e.* 12 Geo. II, c. 28); and then goes on to subject the keeper and adventurer in Passage to the same penalties. By 17 Geo. II (*a*), all persons " playing or betting " at any unlawful games or plays, shall be deemed " rogues and vagabonds within the meaning of " that act." And by another act (*b*), it is enacted, That if any person or perons shall play at the game of Rooler, otherwise Roly Poly, or any game or games with cards or dice already prohibited by law, they shall be subject to the penalties of 12 Geo. II, c. 28.

The 18th Geo. II (*c*) also, in order to prevent gaming which seems to have been very excessive, provides, that no person, except the plaintiff or defendant, shall be incapable of being a witness in these cases, though they may have been actually concerned in the play themselves.

(*a*) c. 5, § 2. (*b*) 18 Geo. II, c. 34, § 2. (*c*) § 5.

And, by section 8, every person who loses 10*l.* at one sitting, or 20*l.* within 24 hours, are subjected to an indictment; and, upon conviction, punishable with a fine of five times the value of the sum so lost or won; and this clause extends to the winner as well as loser.

It seems that the vice of gaming must have arisen to a very excessive height at the period in which these acts were passed; for, in so short a space of time as five years, four acts of Parliament were passed, in order to suppress it, and each of them inflicting a higher penalty than the former.

In the 29th year (*a*) of the same King, it was found necessary to extend the penalties of the laws against lotteries to Ireland, as will appear from the 26th section of 29 Geo. II (*b*).

After this, a period of thirty-two years intervened before the Legislature were called upon to take the subject into consideration; and then it was found necessary again to regulate illegal lotteries, and particularly the practice of insuring tickets in government-lotteries. But, as this forms no part of my present plan, I shall avoid any digression upon the subject; for it was my object to

(*a*) A. D. 1755. (*b*) c. 7.

consider only those lotteries which the law looks upon as gaming, within the several statutes on that head.

And I only notice here, 27 Geo. III (*a*), as far as it affects the former Lottery Laws; and in this view of it I shall mention only the second section, which directs that no pecuniary penalty shall be recoverable before a justice of the peace; but that they may be sued for by a common informer, in any of his Majesty's Courts of Record at Westminster, one moiety of the penalty given to the informer, and the other to the King.

The last statute of this kind is 42 Geo. III. (*b*); and which, being of so late a date, and levelled at more modern games, I shall abstract more at large. The preamble states, "That evil-disposed persons do frequently resort to public-houses and other places, to set up certain mischievous games or lotteries, called *Little Goes*;" and therein servants, children, and unwary persons are drawn in and ruined; and for remedy whereof, "all "such games or lotteries called *Little Goes*," are declared common and public nuisances, and against law. And by section 2, enacts, "That no "person or persons whatsoever, shall publicly or

(*a*) c. 1, § 2. The 34th Geo. III, c. 40, § 37, inflicts a particular punishment on offenders against this act.

(*b*) c. 119.

" privately keep any office or place to exercise,
" keep open, shew, or expose to be played, drawn,
" or thrown at or in, either by dice, lots, cards, balls,
" or by numbers or figures, or by any other way,
" contrivance, or device whatsoever, any game or
" lottery called *A Little Goe*, or any other lot-
" tery whatsoever, not authorized by parliament,
" or shall knowingly suffer to be exercised, kept
" open, shewn, or exposed to be played, drawn,
" or thrown at or in, either by dice, lots, cards,
" balls, or by numbers or figures, or by any other
" way, contrivance, or device whatsoever, any
" such games or lottery in his or her house, room,
" or place, upon pain of forfeiting for every such
" offence the sum of five hundred pounds, to be
" recovered in the Court of Exchequer, at the
" suit of his Majesty's Attorney General, and to
" be to the use of his Majesty; and every person
" so offending shall be deemed a rogue and va-
" gabond within the intent and meaning of
" 17 Geo. II. c. 5."

By section 3, though persons may not be sued as aforesaid, yet they shall be deemed rogues and vagabonds.

By section 4, on information, a justice may authorize, by special warrant, any person or persons to break open any doors of any house by day or night, where such offence shall be committed

(if by night, a peace-officer must be present) and to apprehend the offender, and bring him before any justice of the peace for the county, &c. to be dealt with according to law; and aiders and abettors to be dealt with in like manner, and be deemed rogues and vagabonds; and persons obstructing the officer in execution of his duty, or the persons acting in his assistance, to be deemed breakers of the peace, and to be publicly whipped, fined, and imprisoned; and aiders and abettors, "though not discovered in such place or house as "aforesaid," are liable to the same punishment.

By section 5, "No person or persons whatsoever shall, on or under any pretence, device, form, denomination, or description whatsoever, promise or agree to pay any sum or sums, or to deliver any goods, or to do or forbear doing any thing for the benefit of any person or persons, whether with or without consideration, or any event or contingency relative or applicable to the drawing of any ticket or tickets, lot or lots, numbers or figures, in any such game or lottery, or to publish any proposal for any of the purposes aforesaid; and if any person or persons shall offend in any of the matters aforesaid, he, she, or they shall, for every offence, forfeit and pay the sum of one hundred pounds."

By section 6, any person may apprehend the offender on the spot, and convey him to a magistrate, who, on conviction, may give judgment, and sentence him accordingly; and if the penalty be not immediately paid, he may commit the offender to prison for six months, or till the penalty is paid, without bail, mainprize, or appeal, one-third of the penalty to the King, one third to the informer, and one-third to the person securing the offender.

It has already been hinted, in the outset of this chapter, that games, as such, are not prohibited by the common law; and in support of this, I will state my Lord Coke's own words upon the subject, in "the case of Monopolies." The question *there* was, Whether the Queen had the power to grant an exclusive privilege to make cards? — and considering this subject, he says (*a*) "And the playing at dice and cards is not "prohibited by the common law, as appears in "Mich. 8 and 9, El. Dyer, 254 (unless a man is "deceived by false dice or cards; for then, he "who is deceived shall have an action upon his "case for the deceit); and therefore playing at "cards, dice, &c. is not *malum in se*, for then the "Queen could not tolerate nor licence it to be "done: and where King Edward III, in the

(*a*) Case of the Monopolies, 11 Rep. 87, b.

"thirty-ninth year of his reign, by his proclama-
"tion, commanded the exercise of archery and
"artillery, and prohibited the exercise of casting
"of stones and bars, and the hand and foot-
"balls, cock-fighting, &c. *et alios ludos vanos*,
"as appears in Dors. claus. de An. 39. E. III, nu.
"23; yet no effect thereof followed, till divers of
"them were prohibited upon penalty, by divers
"acts of parliament, viz. 12 Ric. II, c. 6. 11
"Hen. IV, c. 4. 17 Ed. IV, c. 3. 33 H. VIII,
"c. 9."

We find that even nine-pins was an illegal game in the time of Charles the Second; for, according to Keble (*b*), the defendant was indicted for "keeping an unlawful game of nine-pins;" and Siderfen says it was "*pur illoial keeping quosdam* "*clavos ligni*." Anglice *Scoils*.

Though we have considered horse-racing very fully in a former chapter (Chap. III.) yet we may mention this case again, as to one point decided in it (*c*), that horse-races were illegal before the 13 Geo. II, c. 19; and that they were included in the general words, "other game or games," in the 9th Ann c. 14.

(*b*) K. *v.* Warren, 1 Sid. 217. 1 Keb. 885, S. C.
(*c*) Goodburn *v.* Marley, 2 Stra. 1159.

This was an action of assault and battery; and the fighting of the plaintiff and defendant was proved to have been by consent (*d*). It was argued, on the part of the defendant, that *volenti non fit injuria:* but Parker, C. B. said, That the fighting being unlawful, the plaintiff's having consented to fight would not bar the action; and that he was entitled to a verdict for the injury done to him; and cited Winch. 49. 2 Lee, 174; and Webb and Bishop, in 1731, before Chief Baron Reynolds; where, in an action for five guineas on a boxing-match, the judge held it an illegal consideration; and the plaintiff was nonsuited.

One man cannot give another a licence to beat him, for that is a breach of the peace; and, therefore, the plaintiff had a verdict, and 30*s.* damages (*e*).

A bond was given for money won at cricket; and cricket was considered as a game within 9 Ann; but the court was inclined to think that cricket, though not illegal in itself, might become so by betting too largely upon it (*f*).

A foot-race is also a game within the meaning of the acts against gaming; and if one man is

(*d*) Boulter *v.* Clarke, Bul. N. P. 16.
(*e*) Matthew *v.* Ollerton, Comb. 218, Bull. N. P. 16.
(*f*) Jeffery *v.* Walker, 1 Wils. 220.

running against time, that is sufficient to constitute a foot-race (*a*); and this case has been fully acknowledged by a subsequent decision, where the particular circumstances were, That "the defendant did not find a man who should carry on "foot twenty-four stone weight ten miles, within "fifteen hours time (*b*)." On demurrer, this was held to be a game within the meaning of the words "other game or games," in the statute of Ann; and the case was held decisive of this: for Lord Mansfield, in giving judgment, says, "We "took time to see if we could distinguish this case "from Lynall *v.* Longbottom, cited in the argument. We think there is no difference between "them; and, therefore, there must be judgment "for the defendant."

The game of Hazard also is illegal; and beside the statute, the court of C. P. have declared it to be so (*c*).

In other cases also, the game of Hazard has been determined frequently to be an unlawful game (*d*); and it seems quite sufficient (in order to convict a man of keeping a gaming-table) to

(*a*) Lynall *v.* Longbottom, 2 Wils. 36.
(*b*) Brown *v.* Berkeley, Cowp. 281.
(*c*) Brown *v.* Leeson, 2 H. Bl. 43.
(*d*) K. *v.* Liston, 5 T. R. 338.

prove, that the defendant was master of the house, and acted as master of a hazard-table, though no mention was made of dice; and that a dice-box and dice were seen on the table, with several persons assembled round it, though the witness did not actually see any one playing: and it would behove the defendant to shew for what purposes the dice were there; and that they were not for the purpose of gaming.

SECTION II.

Wherein is considered, in what Manner the Law treats Accidents and Deaths which happen in the Course of Athletic Games or Exercises; and how deceitful and fraudulent Gaming is punished.

Hitherto, we have considered chiefly such games as are played with cards, dice, and such things as are not likely to produce personal violence to the players; and therefore most of the points have turned upon questions in civil suits, and whether the party were liable to reimburse his winning (as is the case under 9 Ann, c. 14); or whether he can recover the amount of a bet won: but we shall see here how some of these transactions, and their incidents, are treated by the criminal law; and in what cases they are breaches of the peace.

The peace of society and security of individuals, is the grand object of all municipal law; and even the amusements of men, if carried so far or so circumstanced, that the peace and quietness of their neighbours are disturbed by them, are considered as crimes, and as such are punishable.

And I will begin this part of the subject by laying down a general rule; nor can I do that better than by transcribing one already done, by a very learned and experienced criminal lawyer of our own time.

"It seems," says he (*a*), "now the better opinion, that manly sports and exercises, which "tend to give strength, activity, and skill in the "use of arms, and are entered into merely as "private recreations amongst friends, are not "unlawful; and therefore persons playing by "consent at (*b*) cudgels, or foils, or (*c*) wrestling, "are excusable if death ensue." And in the same section he says further, "It seems also, that "in cases of friendly contests with weapons, "which, though not of a deadly nature, may yet "breed danger, there should be due warning "given, that each party may start upon equal "terms: for if two were engaged to play at cud-

(*a*) 1 East, C. L. c. v. § 41. 1 Hale, 472.
(*b*) K. *v.* Keete, Comb. 408.
(*c*) Lane's Case, 1717, & 1 Hawk. c. xxix. § 7.

" gels, and the one made a blow at the other, likely " to hurt, before he was on his guard, and with- " out warning, from whence death ensued, the " want of due and friendly caution would make " such an act amount to manslaughter, but not " to murder; because the intent was not mali- " cious." And on this ground Sir John Chiches- ter was held to be guilty of manslaughter, who was practising fencing with his servant; and had a sword in the scabbard, but the end of the sheath was beaten off in the course of the play, and the servant killed (*a*). In the case too of persons shooting at butts or marks, if any one be killed, the degree of crime will much depend upon the particular caution and notice used: and Sir Michael Foster says, That in the case of Sir John Chichester, *there was in fact no playing at foils in that case;* and blames Sir John for having used a deadly weapon with so little caution (*b*). It never was said, that a gentleman may not learn the use of foils, cudgels, or any other weapon; and may practise them for his amuse- ment or improvement; and if in so doing, death should ensue, he would only be guilty of *homicide* by misadventure: but particular circumstances might raise the crime to manslaughter. And this is so clear, that it will only be necessary, in ad-

(*a*) Aleyn 12. 1 Hale, C. P. 472.
(*b*) Fost. C. L. 260.

dition to what has been said, to observe that the law on this subject and references to cases, may be found collected in Mr. East's book, before referred to.

But this excuse will not reach accidents which happen where the parties are prize-fighters; for, as Mr. Justice Foster most properly observes, they "are exhibited for lucre, and can serve no "valuable purpose; but, on the contrary, en- "courage a spirit of idleness and debauchery (*a*)." And throwing at cocks, bull-baiting, and all these disorderly amusements, are equally illegal and punishable. He also relates, that a man, at the diversion of cock-throwing, at Shrove-tide, missed his aim; and a child looking on received a blow from the staff, of which he soon died: he tried the man, and ruled this to be manslaughter; for he goes on to say, "It is a barbarous unmanly "custom, frequently productive of great dis- "orders, dangerous to the by-standers, and ought "to be discouraged."

But in quarrels of this sort, in order to raise the crime to murder, the same malicious intent must exist as in other cases. In Lord Coke's 12 Rep. 87, we find the following case: — "Divers "men playing at bowls, at Great Marlow, in the

(*a*) Fost. 260.

" county of Kent, two of them fell out, and quar-
" relled the one with another; and the third
" man, who had not any quarrel, in revenge of
" his friend, struck the other with a bowl, of which
" blow he died; and this was held manslaughter
" for this, that it happened upon a sudden motion
" in revenge for his friend."

However, the Legislature has taken great care to provide against quarrels which happen in consequence of gaming, and have attached a very heavy punishment on such quarrels. Accordingly, the 9th Ann (*a*), " For the preventing of such
" quarrels as shall and may happen upon the ac-
" count of gaming, enacts, That in case any person
" or persons whatsoever shall assault and beat, or
" shall challenge or provoke to fight, any other
" person or persons whatsoever, upon *account of*
" *any money won by gaming, playing, or betting*
" *at* any of the games aforesaid, (*i. e.* by section
" 1. of same stat. at cards, dice, tables, tennis,
" bowls, or other game or games whatsoever, or
" by betting on the sides or hands of such as do
" game at any of the games aforesaid) such per-
" son or persons assaulting and beating, or chal-
" lenging or provoking to fight, such other per-
" son or persons upon the account aforesaid, shall,
" being thereof convicted upon an indictment or

(*a*) c. 14, § 8.

" information to be exhibited against him or them " for that purpose, forfeit to her Majesty, her " heirs and successors, all his goods, chattels, and " personal estate whatsoever, and shall also suffer " imprisonment, without bail or mainprize, in the " common gaol of the county where such convic- " tion shall be had, during the term of two years."

On this statute I can find only two cases of consequence to have been decided; the first was that of the King v. Randal (*a*), where the prosecutor had been gaming with the defendants, and having lost his money to them, they had proposed breaking up and going away; but that he objected to it, and wanted them to play on, saying that they had won his money, and would give him no opportunity of recovering it back; upon which they had committed the assault. Buller, J. who tried the cause, was of opinion, that the game being over before the assault began, the assault could not be said to have arisen out of the game, but from what the prosecutor had said to the defendants; *and that it was necessary, in order to bring a case within the statute, that the assault should arise out of the play, and during the time of playing*; but that here the play was over, and the dispute had arisen from the prosecutor's own words; and therefore he directed the jury to acquit them of the charge.

(*a*) 1 East C. L. c. 8. § 17.

This doctrine, however, has been entirely subverted by the decision of the Court of K. B. in the more recent case of the King *v.* Darley (*a*), tried at the Spring Assizes 1803, for the county of Sussex, by Heath, J. The defendant and one Embden, the prosecutor, played together at a game, called "Under Seven, over Seven." At the end of the play, the prosecutor got up winner of 50 *l.* and it was agreed that the money should be paid at a *future day*. The next day the prosecutor called upon Darley, and asked for his money; upon which the defendant proposed to play with the prosecutor *then*, which was declined, and some provoking language passed from the prosecutor to the defendant, and *then* the assault took place. For this assault Embden prosecuted defendant on this clause of the statute, upon which the defendant was convicted; and the Court referred to the Judge who tried the cause, to know in what manner the case was left to the jury; who returned for answer, That he had distinctly left it to them to decide, Whether the assault was *on account of the money won at play* the day before, or on account of the ill language which had arisen afterwards upon the demand of payment being made?

Lord Ellenborough said, that he could not go the length of the opinion in the case cited (*i. e.*

(*a*) The King *v.* Darley, 4 East. Rep. 174.

R. v. Randal) and consider the words of the act as confined to an assault committed during the time of play; for it more frequently happened that disputes of that sort did not arise till the play was over.

The defendant, in consequence, received sentence according to the act.

And, indeed, the opinion delivered by the Chief Justice, in the last case, is more consistent with the intention of the Legislature; for they have expressed their object to be, to prevent "such quarrels as may happen *on account of gaming*;" and mentions no time *when* such quarrels are to take place.

The Legislature have taken much care that the play, when it is allowable, should be fair and honest; and have by a statute inflicted severe punishments upon the offenders in these cases, the principal of which are the 16th Car. II (*a*), where it is enacted, "That if any person or persons, of any "degree or quality whatsoever, at any time or "times after the nine-and-twentieth day of Sep- "tember, which shall be in the year of our Lord "One thousand six hundred and sixty-four, do or "shall by any fraud, shift, cousenage, circumven- "tion, deceit, or unlawful device, or ill practice

(*a*) c. 7, § 2.

" whatsoever, in playing at or with cards, dice, " tables, tennis, bowls, kittles, shovel-board, or " in or by cock-fightings, horse-races, dog- " matches, foot-races, or other pastimes, game or " games whatsoever; or in or by bearing a share " or part in the stakes, wagers, or adventures; or " in or by betting on the sides or hands of such " as do or shall play, act, ride, or run as afore- " said, win, obtain, or acquire to him or them- " selves, or to any other or others, any sum or " sums of money, or other valuable thing or " things whatsoever, that then every person and " persons so offending as aforesaid, shall *ipso* " *facto* forfeit and lose treble the sum or value of " money or other thing or things so won, gained, " obtained, or acquired, the one moiety thereof to " our Sovereign Lord the King, his heirs and " successors; and the other moiety thereof unto " the person or persons grieved, or who shall " lose the money or other thing or things so " gained, so as every such loser and person " grieved in that behalf, do and shall prosecute " and sue for the same within six calendar months " next after such play."

In a case as follows (*a*), Humphries had given a bond to Rigby, for securing money won at play, it appeared that Rigby had won by shuffling the

(*a*) Rigby *v.* Humphries, 2 Eq. Ca. Ab. 184.

cards, so that Jack turned up several times together (the game being All-Fours); and equity relieved the plaintiff against this bond, on the ground of fraud, though not a case within the stat. of 16 Car. II, c. 7. — This case was before the stat. of Ann, whereby these securities are rendered void. *Vide post*, c. v.

By section 5 of 9 Ann (*a*), it is enacted, "That "if any person or persons whatsoever, at any "time or times after the said First day of May, "One thousand seven hundred and eleven, do or "shall, by any fraud or shift, cousenage, circumvention, deceit, or unlawful device or ill practice whatsoever, in playing at or with cards, "dice, or any the games aforesaid, or in or by "bearing a share or part in the stakes, wagers, "or adventures, or in or by betting on the sides "or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or "sums of money, or other valuable thing or "things whatsoever, or shall at any one time or "sitting win of any one or more person or persons "whatsoever, above the sum or value of ten "pounds, that then every person or persons so "winning by such ill practice as aforesaid, or "winning at any one time or sitting above the

(*a*) c. 14.

" said sum or value of ten pounds, and being " convicted of any of the said offences, upon an " indictment or information to be exhibited against " him or them for that purpose, shall forfeit five " times the value of the sum or sums of money or " other thing so won as aforesaid; and in case " of such ill practice as aforesaid, shall be deemed " infamous, and suffer such corporal punish- " ment as in cases of wilful perjury; and such " penalties to be recovered by such person or " persons as shall sue for the same by such ac- " tion as aforesaid."

Upon this latter section of the act it has been determined (*a*), that if a person is convicted upon it, the court can only give judgment, *quod convictus est;* and a new action must be brought upon that judgment for the forfeiture; for this is the foundation of the common informer's right to sue at all.

Besides the remedy and penalties pointed out by the statutes, it has been long a settled matter, that an action may be maintained by the loser against the winner, if the money be won by any fraudulent means, as false dice (*b*), or by packing the cards (*c*);

(*a*) K. *v.* Luckup, Stra. 1048.
(*b*) Harris *v.* Bowden, Cro. Eliz. 90.
(*c*) Co. Dig. " Action upon the case for a deceipt." (A. 1.)

and this has been already mentioned in the case of Rigby *v.* Humphries.

The law indeed goes even farther than this, and considers the crime of playing with false dice as an offence against the public, and as such, punishable by the common law. Accordingly, we find that one Martin Leeser was convicted of playing with false dice; and sentenced by the Court of King's Bench to stand in the pillory six several times, for "that he was a common cozener of "the King's *people* (*d*)." And so far has this matter been carried, that, in an action of assault and battery, the defendant was allowed to justify taking the plaintiff, for the purpose of carrying him before a magistrate, who bound him to appear at the sessions, "for playing with the defendant and "one W. A. with false dice, subtilly conveyed by "the plaintiff (divers sums of the defendant's "money, *falso et fraudulenter depredatis*)" &c. Upon a demurrer, judgment was given for the defendant (*e*).

(*d*) Cro. Jac. 497.

(*e*) Holyday *v.* Oxenbridge, Cro. Car. 234.

CHAPTER V.

OF MONEY LENT TO PLAY WITH, THE SECURITIES GIVEN FOR MONEY SO LENT, AND MONEY WON.

IN order to render the practice of gaming more hazardous, the Legislature have thought it wise to make all securities given for money won at play, whether on real or personal property, utterly void; so that where the unwary dupe has not money with him sufficient to satisfy his rapacious plunderers, and gives them securities instead of money, these securities cannot stand up against him as a lawful charge: and further, if he makes such securities chargeable on his land, he will forfeit any particular estate which he may have in it; and the land shall go to the next claimant. As these provisions of the Legislature extend over a large and important field, I have reserved a chapter solely to their consideration. The first statute of any importance, is one passed in the reign of Charles the Second (*a*), which, among other things, enacts, "That if any person "or persons shall, at any time or times after the "nine-and-twentieth day of September aforesaid "(in 1664) play at any of the said (see § 2 of the

(*a*) 16 Car. II, c. 7, § 3.

" act, *ante* chap. iv. p. 70) games, or any other " pastime, game or games whatsoever (*other than " with and for ready money*) or shall bet on the " sides or hands of such as do or shall play " thereat, and shall lose any sum or sums of " money, or other thing or things so played for, " exceeding the sum of one hundred pounds, at " any time or meeting, upon ticket or credit, or " otherwise, and shall not pay down the same at " the time when he or they shall so lose the " same, the party and parties who loseth or shall " lose the said monies, or other thing or things " so played, or to be played for, above the said " sum of one hundred pounds, shall not, in that " case, be bound, or compelled or compellable " to pay or make good the same; but the con- " tract and contracts for the same, and for every " part thereof, and all and singular judgments, " statutes, recognizances, mortgages, convey- " ances, assurances, bonds, bills, specialties, pro- " mises, covenants, agreements, and other acts, " deeds, and securities whatsoever, which shall " be obtained, made, given, acknowledged, or en- " tered into for security & satisfaction of or for " the same, or any part thereof, shall be utterly " void, and of none effect: and that the said " person or persons so winning the said monies " or other things, shall forfeit and lose treble the " value of all such sum and sums of money or " other thing or things which he shall so win,

" gain, obtain, or acquire above the said sum of " one hundred pounds; the one moiety thereof to " our said Sovereign Lord the King, his heirs and " successors, and the other moiety thereof to such " person or persons as shall prosecute or sue for " the same within one year next after the time of " such offence committed."

This not proving sufficient to check the growing evil of excessive gaming, the Legislature again, after a period of forty-six years, were obliged to declare, by the stat. of 9th Ann (*a*), that "All notes, bills, " bonds, judgments, mortgages, or other securities " or conveyance whatsoever, given, granted, drawn, " or entered into, or executed by any person or " persons whatsoever, where the whole or any part " of the consideration of such conveyances or se- " curities shall be for any money, or other valua- " ble thing whatsoever, won by gaming, or playing " at cards, dice, tables, tennis, bowles, or other " game or games whatsoever, or by betting on the " sides or hands of such as do game at any of the " games aforesaid, or for the reimbursing or re- " paying any money knowingly lent or advanced " for such gaming or betting, or lent or advanced " at the time and place of such play, to any per- " son or persons so gaming and betting as afore- " said, or that shall during such play so play or

(*a*) c. 14, § 1.

" bet, shall be utterly void, frustrate, and of none " effect to all intents and purposes whatsoever, " any statute, law, or usage to the contrary there- " of in anywise notwithstanding; and that where " such mortgages, securities, or other conveyances, " shall be of lands, tenements, or hereditaments, " or shall be such as encumber or affect the same, " such mortgages, securities, or other conveyances " shall enure, and be to and for the sole use " and benefit of, and shall devolve upon such per- " son or persons as should or might have or be " entitled to such lands, tenements, or heredita- " ments, in case the said grantor or grantors " thereof, or the person or persons so incum- " bering the same, had been naturally dead, and as " if such mortgages, securities, or other convey- " ances, had been made to such person or persons " so to be entitled after the decease of the person " or persons so incumbering the same; and that " all grants and conveyances to be made for the " preventing of such lands, tenements, and heredi- " taments from coming to or devolving upon such " person or persons hereby intended to enjoy the " same as aforesaid, shall be deemed fraudulent " and void, and of none effect, to all intents and " purposes."

By section 2, " Any person who, at any one sitting, loses, either by playing, or betting on others who do play, the sum or value of 10*l.* he may re-

cover it back from the winner in an action of debt on that act; and, by the same section, if the loser do not sue in three months, any one else may sue for and recover the sum, with treble its value."

By section 5, "Persons winning by unfair means in playing or betting above the sum of 10 *l.* at one sitting, they shall forfeit five times the sum, be deemed infamous, and suffer the penalties of wilful perjury." (See this section at length, *ante* Chap. iv. p. 72.)

By section 9, "This act does not extend to playing in the King's Palaces, while his Majesty is in *actual residence there*; but royal palaces under lease to other persons, are not exempt."

The first case (*a*) that occurs was on the stat. of Charles, for a wager of 100 *l.* upon a horse-race, where the plaintiff and defendant entered into articles of agreement. In support of the agreement, Holt argued, that the contract was good, because entered into before any match was run: but the Court said, "That to permit this to be a valid reason, the statute would be rendered nugatory by persons entering into gaming-contracts before the gaming began." He argued, secondly, that contract was for 100 *l.* only; the statute affects secu-

(*a*) Hedgeborrow *v.* Rossenden, 1 Vent. 253, S.C. 2 Levintz, 94.

rities for more than 100 *l.* But here the Court also were of opinion, that the bargain was void; and said, "They would extend this statute as largely "as might be in suppressing of gaming, which was "so mischievous." Though the statute has the words, *at any one time or meeting*, yet the Courts have gone as far as possible to give the act effect; for where (*a*) the defendant, at one meeting, won 80 *l.* for which plaintiff gave security; and *another meeting was appointed*, and defendant won 70 *l.* more, the Court were divided whether this was within the statute. And therefore, where (*b*) the players were in company from Monday evening to Tuesday evening, although an hour or two was taken up by their dinner, yet this was adjudged to be one sitting only; and so held by the whole Court, on a motion for a new trial, though the jury had found a verdict for the defendant. The action itself being brought upon the 9th of Ann, to recover back the money lost, the Court further determined, that this act is not *penal*, but *remedial*. So much as to the *time* of playing.

We shall now consider the securities, and the manner of giving them; taking the cases, as usual, in their chronological order, paying as much respect to uniformity of subject as we can.

(*a*) Hill *v.* Pheasant, 2 Mod. 54.
(*b*) Bones *v.* Booth, 2 Blac. 1226.

In the following case (*a*), however, a security was not considered as void; and its own peculiar circumstances will shew how it became exempt from the general operation of the statute. A man won 100*l.* of another at play: the winner owed one Sharp 100*l.* who demanded his debt; the winner brought him to the other, of whom he won the money at play, who acknowledged the debt, and gave Sharp a bond for the payment of the 100*l.* who, *not being privy to the matter, or knowing that it was won at play,* accepted the said bond, and for default of payment put it in suit. On account of the ignorance of Sharp, that the bond was in fact a security for a gaming debt, the Court permitted *him* to recover upon it; when the winner would have been excluded by the illegality of the consideration.

As to the form of the action to recover money won (when it is recoverable) it has been held (*b*), that *indebitatus assumpsit* will not lie;

(*a*) Anonymous, 2 Mod. 279.

(*b*) Walker *v.* Walker, 12 Mod. 69 and 258. In this case there is a reference to Crouch's case in the same vol. p. 336, where Lord Holt is made to say, and seemingly with no reference to that case, "If one lose 100*l.* to one; and after, "100*l.* to another, at one sitting, both debts are lawful, notwithstanding the statute. So if a man lose 500*l.* ready money, and 100*l.* upon tick, both are good. And if there be "two sharpers, and one of them gets 100*l.* and gives over,

it must be brought upon the consideration of mutual promises; and so held in two cases by Lord Holt (*a*).

But where (*b*) the security was a bond given for a wager won on collateral matter, and not on the game itself, the plaintiff, it appears, may recover. As this case (*c*) is reported in Skinner, it is said to have arisen out of a *bond*; and though judgment does not there appear to have been given, yet, by the report of the same case in Salkeld, it was held that the *wager* itself was not within the statute; and it is therefore reasonable to suppose that the *bond* was not held to be so. However, according to the statement of it in the 4th vol. of Modern Reports, it seems that the wager was reduced into writing; it is, however, called *a note*. Be that as it may, judgment was given in K. B. for the plaintiff; which

" and then another takes him up, who wins another 100*l*. " both are good; for they were sharpers, he was a rake, " and ought to learn wit by being bit; and they are distinct " facts." — To which the Reporter adds a note: " I have " heard Treby, C. J. of Common Pleas, deliver a quite con- " trary opinion, in a case where two win successively; because " in that case the statute, which ought to receive a favourable " interpretation in suppression of vice and gaming, would be " very easily evaded." And I very much think that Mr. C. J. Treby's opinion would be adhered to at this day, rather than Holt's.

(*a*) Anonymous, 12 Mod. 81.

(*b*) St. Leger *v.* Pope, Skinner, 573.

(*c*) S. C. 4 Mod. 405.

judgment was afterwards reversed, because the plaintiff had not averred that "*the wager in the* "*writing and that for which the action was* "*brought was the same wager.*"

In this case (*a*) several points were determined respecting bills of exchange given for gaming considerations; which I shall state from Lord Raymond's Report of it, as the most distinct and precise. Lord Chandos had lost a sum of money to the plaintiff, Hussey; for payment of which he gave a bill of exchange upon Jacob, who accepted it. It was argued for the plaintiff, that if this bill were held void, it would greatly diminish the credit of bills of exchange, which were negotiated upon the faith of acceptance. But the Court were unanimously of opinion, "That if a man has lost "money at gaming, *viz.* more than 100 *l.* at one "time, and he procures J. S. to be bound for the "payment of it, or, as the principal case is, gives "a bill of exchange for the payment of it, which "is accepted, both these securities are void by the "said act." They further said, "But if he who "wins, being indebted to a stranger, procures him "who loses to bind himself to the stranger for pay- "ment of the money due by him who wins, to "the stranger, in consideration of a discharge of

(*a*) Husey *v.* Jacob. Lord Raymond, 87 S. C. Holt, 328. Carth. 356. 1 Salk. 344.

" the money which he hath lost at gaming, this " (*a*) *bond which he makes to the stranger is not* " *within the act*, because it is made for a just " debt. So in this principal case, if the bill of ex- " change had beenafterwards assigned for a valua- " ble consideration, the honesty of this assignment " had purged the original canker, and rendered it " good enough."

But since this determination, it has been held that the reverse is law; and the statute of 9th Ann has declared these notes void to " *all intents and* " *purposes whatsoever*;" on which act the case of Bowyer v. Bampton (*b*) was decided; when the indorsee, though innocent, and a *bona fide* purchaser of the note, could not recover against the drawer, but must resort to the indorser. And, in giving judgment, the Court said, " Though it will " be some inconvenience to an innocent man, yet " that will not be a balance to those on the other " side; and the plaintiff is not without a remedy, " for he may sue Church (the indorser) on his " indorsement. And it is but the common hazard " of taking notes of infants or feme coverts."

And the last case has been fully recognized by several subsequent decisions; in particular by

(*a*) But this must be taken with a supposition that the stranger is ignorant of the gaming transaction. See Anonymous, *ante* 81.

(*b*) Strat. 1155.

Lord Mansfield, in his judgment in Lowe *v.* Waller (*a*), who thus notices it: "Now, as to gaming, "the case of Bowyer *v.* Bampton is a direct and "solemn authority. The decision was after two "arguments; and Lee, C. J. observed, that what "Lord Holt said, in Hussey *v.* Jacob, was extra-"judicial; and that he had seen a report wherein "notice was taken, that all the learned part of the "Bar wondered at it; and, indeed, by the report "of the case in Carthew (p. 356) the Court is "only made to say, *that if the bill had been nego-"tiated and indorsed to any other person for value "received, then it might have been another con-"sideration.* It must be admitted that the bill, in "the present case (which was for an *usurious "consideration*) was void at first. Now, how "can a thing void in its origin, be rendered "valid by any thing done to it afterwards?"

The facts in the following case (*b*) were, that the plaintiff won, at a cricket-match, 25 guineas of one Parsons; and also a second bet of 25 guineas, upon a second game; and it was agreed between Parsons and Jefferies, that if Jefferies would advance to Parsons 447 *l.* 10 *s.* to make up the two lost bets 500 *l.* he, Parsons, would give him a bond to pay an annuity of 100 *l.* to Jefferies during

(*a*) Doug. 743.

(*b*) Jefferies *v.* Waller, 1 Wils. 220.

their joint lives: the defendant avers, that the bond in question was given by him *as a collateral security for money won at play*, and that it is void by the statute.

The Court seemed inclined to hold this bond void, on the case put by Holt, C. J. in Salk. 344; "but (says the Reporter) it stood over for fur-"ther argument; and the parties agreed *ut* "*audivi.*"

In this case (*a*) the subject was very fully discussed and argued, and has, ever since its determination, been considered a leading one; I shall therefore state the facts at length, and the points decided by it. The action was *assumpsit* against the defendant, as administratrix of Sir John Bland, Bart. upon a bill of exchange. At the trial, a verdict for 672 *l.* was found for the plaintiff, subject to the opinion of the Court on the following case:

That the bill of exchange was given at Paris, for 300 *l.* there LENT by the plaintiff to Sir J. B. at the time and place of play; and for 372 *l.* more LOST at the same time and place, by Sir John Bland to the plaintiff, at play.

(*a*) Robinson *v.* Bland, 2 Bur. 1077.

That the play was very fair; and there is no imputation whatsoever on the plaintiff's behaviour: that there were several gentlemen and persons of fashion then and there at play, besides the plaintiff and Sir John Bland.

That in France, money LOST AT PLAY between gentlemen, may be recovered as a debt of honour, before the Marshals of France, who can enforce obedience to their sentences by imprisonment; though such money is not recoverable in the ordinary courts of justice.

That money LENT to play with, or at the time and place of play, may be recovered there, AS A DEBT, in the ordinary course of justice; there being no positive law against it. That Sir John Bland was, and the plaintiff is, a gentleman.

The question was, Whether, under these circumstances, the plaintiff is entitled to recover *any thing*, and what, against the defendant?

In giving the opinion of the Court, Lord Mansfield said, amongst many other things (all of which I shall not mention, confining myself only to such as are direct to the points in the case).

" As to the first question, the defendant has objected: that the consideration of the bill of ex-

change is wholly for money won and lent at play; therefore, by force of the writing, the plaintiff cannot by the law of England recover; such security being utterly void. And, no doubt, the law of England is so.

"Second question, Then as to the other counts for money had and received to the plaintiff's use, and for money lent and advanced to him, — consider it distinctly as to each part, the money WON and the money LENT.

"1st, As to the money WON. By the rule of the law of England, no action can be maintained for it.

Next, as to the money LENT. The sense of the Legislature seems to me to be agreeable to the cases cited.

"The act of 16th Car. II, c. 7, § 3, does not meddle with money LENT at play; but as to money (exceeding 100*l.*) LOST, and not paid down at the time of losing it, it says, "That the loser shall not "be compellable to make it good; but the con- "tract and contracts for the same, and for every "part thereof, and all securities, shall be utterly "void," &c. The words "contract and contracts "for the same," are not in the statute of Ann; and I dare say were designedly left out; it only says, "That all notes, bills, bonds, judgments, mort-

" gages, or other securities, &c. for money won or " lent at play, shall be utterly void," &c.

" Here the money was fairly LENT, without any imputation whatsoever. Sir John Bland, the borrower of it, being in a foreign country, might very naturally have been distressed under his then situation amongst foreigners, for want of having ready money, or knowing how to procure it; and it might be even a kind, and generous, and commendable act to lend it to him at that time, to extricate him from his difficulties, as he was then circumstanced. The jury have left it quite open to the Court to determine, " Whether any thing, and what, is recoverable?" As to the money WON, we think it cannot be recovered. As to the money LENT, the plaintiff is entitled to it, both by the law of England and by the law of France."

Mr. Justice Denison, in giving his opinion, says, " There is a distinction between the *contract* and the *security*. If part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security; that being entire, is bad for the whole. Therefore the plaintiff ought to be barred of this action upon this bill of exchange, as being a void security by the laws of this country, where he brings his action. But still the contract remains, and he has a right to maintain his action for so

much of his demand as is legal, which is the money LENT."

Mr. Justice WILMOT. Here are two sums demanded, which are blended together in one bill of exchange, but are divisible in their nature.

As to the money LENT, the cases that have been cited are in point, "that it is recoverable." But if there were not, yet I should be clear that the plaintiff might maintain his action for that.

The statutes meant to prevent excessive gaming, and to vacate all securities whatsoever for money WON at play; and the genuine, true, and sound construction of the 9th Ann is, to understand it as intended to prevent any securities being taken for money WON at play, or LENT to play with, when the borrower has lost all his ready cash; but not to make the contract itself void, where the money is fairly and *bona fide* LENT, though at the time and place of play.

It is unnecessary to comment upon a case clear and plain as this is. I have given the immediate opinions of the Judges, as they bear upon the principal points, and omitted any other matter. I shall therefore proceed to cases which more particularly relate to money where no security is made; the first of which is that of Dickson

v. Powlet (*a*), where the plaintiff brought *assumpsit* for 40*l.* The defendant pleaded it was for money won at play; and that at the same time and sitting he lost 66*l.* to I. S.: plaintiff demurred, and had judgment; for it was the opinion of the Court, that losing 106*l.* to *several persons* at one sitting, is not within the statute, unless they go shares fraudulently, and join in the stakes; for then, as to the chance of the game, they are as one person The Reporter adds, — N. B. Holt, C. J. put this case: 'Suppose the 40*l.* had been fairly won, and the 66*l.* with false dice, this will not avoid the 40*l.* debt, unless he was party to the fraud" The same point was again determined in the case of Whitgrave *v.* Chancey (*b*).

Where (*c*) the plaintiff and defendant had gamed together, till the defendant had paid all his ready money to the plaintiff; and then the plaintiff *lent* him ten guineas at a time, till he had lent him 120 guineas; upon an action brought, the Chief Justice (Lee) held, that this was not a case within the statute of Ann; for the word *contract* is not there; and the word *securities* must mean lasting liens on the estate. Upon which the plaintiff had a verdict for 126*l.* accordingly.

(*a*) 1 Salk. 345. (*b*) 1 Lord Ray. 452.
(*c*) Barjeau *v.* Walmsley, Stra. 1249.

If (*a*) a person loses money at a horse-race, and not being able to pay, desires a friend to pay it for him, which he does, the lender may recover that money back again so paid to his use. And this case was decided upon the authority of the last.

It has been already noticed (*ante*, p. 78) that, by the second section of the 9th Ann, the loser may recover back the money he has lost (*i. e.* above 10*l.*) by action of debt; and the Court have held (*b*), that a defendant may be held to special bail in actions of this sort; for the party grieved is plaintiff, and the defendant is made his debtor; and the clause is considered as remedial, and not as penal. The report of this case in Andrews (*c*) is much fuller; and the Reporter states, that Chapple, J. said, It was determined in the Common Pleas, by Lord C. J. Eyre, that if more than 10*l.* is won, and no security given, the winner may, notwithstanding the statute, by an action recover the money: and Chapple said, he was of that opinion; and in such case the loser cannot recover the money back again, the act only extending to such cases where the money is paid.

Since these cases, it has been held, that the assignees of the loser, if he become bankrupt, are

(*a*) Alchinbrook *v.* Hall, 2 Wils. 309.
(*b*) Turner *v.* Warren, 2 Stra. 1079.
(*c*) S. C. Andrews, 70.

entitled to recover under the statute; though, it seems, his executors are not. As the Court were divided in their opinion, I will consider the case (*a*) at large.

The defendant had won of Brandon, before he was bankrupt, 178 *l.* 10 *s.* at Hazard, which Brandon had paid him; whereby, and *by force of the statute*, an action had accrued to the said Brandon before he became a bankrupt; the plaintiff upon this sued as his assignee. The case was twice solemnly argued at the bar of the Common Pleas; and then, in giving judgment, Lord C. J. Eyre said, he felt much difficulty in saying that the action might be maintained. That though the statute had vested a right of action in the loser, liable to be divested at the expiration of three months, yet he thought no duty vested in him till the action was brought. He therefore thought that the plainest and best construction was to say, that no duty is fixed in the loser till the action is brought.

Mr. J. Heath. An executor clearly could not bring the action, which by the statute is limited to the loser himself, within the three months. But the assignees of a bankrupt are different from other representatives; for if the party himself were to

(*a*) Brandon, assignee of Brandon, *v.* Pate, 2 H. Black. 308.

recover the money, he must pay it over to the assignees.

Mr. J. Rooke. I am of opinion that this action may be maintained. The meaning of the act is, that the money lost and paid to the winner is part of the property of the loser. Upon this principle, it was held, in the case in Strange (*ante*, 92) that the loser might make an affidavit of the debt, and hold the winner to bail. This is also a remedial act; and there is a clear distinction between remedial and penal acts: that in the former, a debt is due to the party grieved before the commencement of the action, but not in the latter. As the money then was part of the estate of the bankrupt, the assignees had a right to sue for the recovery of it.

Lawrence, J. having argued the case when at the Bar, gave no opinion.

The Chief Justice, finding his brethren of a different opinion from himself, said, he submitted to their authority; and consequently judgment was given for the plaintiffs.

These are all, at least the most important, cases upon this particular part of the subject: and it will be collected from hence, that the courts of justice have uniformly extended the operation of these

statutes as far as they could; and have given full effect to them, according to the spirit, and not the letter of the law.

Thus there is only one case left, where a man may recover money advanced to another to play with; and that is, where it is barely lent on the parol promise of the borrower.

And as to his winnings, a man can only recover to the value of 10 *l.*

However, there is one case more of a similar sort, though not the same as the foregoing; and I mention it, as somewhat belonging to this class of cases. A husband may maintain an action for money *fraudulently* won from his wife. This (*a*) was an action of trover, and seems to have been allowable, on account of the wife's incapacity to (*b*) alien the personal property of the husband. But it does not appear to me that fraud is necessary to support the action; for the gist of the action of trover is the conversion, and the plaintiff need not prove more than property in himself, possession of the defendant, and his conversion; of which, I think, the receiving the money won would be sufficient evidence.

(*a*) Bull, N. P. 33, 1 Danv. Ab. 23.
(*b*) 1 Keb. 340.

It is therefore held (*a*), that a man may maintain an action of trover against a person to whom his wife has paid money won from her at play, without averring fraud.

(*a*) 1 Sid. 122. 1 Keb. 340.

CHAPTER VI.

OF PUBLIC GAMING-HOUSES.

HITHERTO I have considered the vice of gaming as it respected the person of the gamester, or the game itself. The object of the present chapter will be *places* where such games are carried on; for our laws have been so careful in endeavouring to check this vice, that they not only declare the game unlawful, and incapacitate the player, but they also make the person keeping a house for the purpose of gaming punishable; and thereby, if I may so say, involve the place. Thus the person, the thing, and the place, are all made criminal.

There have been, at different periods, numberless statutes enacted, aiming at the suppression of gaming-houses; but these places were considered as nuisances, and punishable as such, by the common law; the statutes having altered only the mode of proceeding and the punishment, as appears from Mr. J. Blackstone's Commentaries (*a*), where he says, "All disorderly inns, or ale-houses, bawdy-"houses, *gaming-houses*, stage-plays unlicensed, "booths, and stages for rope-dancers, mounte-"banks, and the like, are public nuisances; and "may, upon indictment, be suppressed and fined." I shall, however, begin by considering the statutes in their order of date, taking first that which was

(*a*) IV. Bla. Co. 168, & 1 Hawk. P. C. ch. 75, § 6.

passed in the reign of King Henry VIII (*a*), by which it is enacted, section 11 (the preceding part of the act being relative to exportation and use of bows) "That no manner of person or persons, "of what degree, quality, or condition soever "he or they be, from the feast of the Nativity of "St. John Baptist now next coming, by himself, "factor, deputy, servant, or other person, shall "for his or their gain, lucre, or living, keep, have, "hold, occupy, exercise, or maintain any com-"mon house, alley, or place of bowling, coyting, "clayish, cayls, half-bowl, tennis, dicing-table, or "carding, or any other manner of game prohi-"bited by an estatute heretofore made, or any "unlawful new game, now invented or made, "or any other new unlawful game hereafter "to be invented, found, had, or made, upon pain "to forfeit and pay for every day keeping, having, "or maintaining, or suffering any such game to "be had, kept, executed, played, or maintained "within any such house, garden, alley, or other "place, contrary to the form and effect of this "estatute, forty shillings."

By section 12, "Every person using and haunt-"ing any of the said houses and plays, and there "playing, to forfeit for every time so doing six "shillings and eight pence."

By section 13, if any person hereafter sue for any placard, to "have common gaming in his

(*a*) 33 Hen. viii. c. 9. § 11.

" house, contrary to this estatute, that then it shall " be contained in the same placard what game " shall be used in the same house, and what per- " sons shall play thereat; and every placard grant- " ed to the contrary to be void; and also that the " party obtaining any such placard, before he put " the same in execution, shall be bound with suf- " ficient sureties with him, by recognizances in " the Chancery, in a certain sum to be appointed " by the discretion of the Lord Chancellor of Eng- " land, that he shall not use the said placard con- " trary to the form thereof."

By section 14, " That it shall be lawful to all " and every the justices of peace in every shire, " mayors, sheriffs, bailiffs, and other head officers " within every city, town, and borough within this " realm, from time to time, as well within liber- " ties as without, as need and case shall require, " to come, enter, and resort into all and every " houses, places, and alleys, where such games " shall be suspected to be holden, exercised, used, " or occupied, contrary to the form of this esta- " tute, and as well the keepers of the same as " also the persons there haunting, resorting, and " playing, to take, arrest, and imprison; and them " so taken and arrested, to keep in prison unto such " time as the keepers and maintainers of the said " plays and games have found security to the King's " use, to be bound by recognizance or otherwise,

" no longer to use, keep, or occupy any such house,
" play, game, alley, or place; and also that the
" persons there so found be in like case bound by
" themselves, or else with sureties, by the discre-
" tions of the justices, mayors, sheriffs, bailiffs, or
" other head officers, no more to play, haunt, or
" exercise from thenceforth, in, at, or to any of
" the said places, or at any of the said games."

By section 15, "That the mayors, sheriffs, bai-
" liffs, constables, and other head officers within
" every city, borough, and town within this realm
" where any such officers shall fortune to be, as
" well within the franchises as without, shall make
" due search weekly, or at the farthest at all times
" hereafter once every month, in all places where
" any such houses, alleys, plays, or places shall
" be suspected to be had, kept, and maintained;
" and if the said mayors, sheriffs, bailiffs, consta-
" bles, and other head officers, within their cities,
" boroughs, and towns, as well within franchises
" as without, do not make due search at the far-
" thest once every month, if the cases so require,
" according to the tenor of this act, and do not
" execute the same in all things according to the
" purport and force of the same; that then every
" such mayor, sheriff, bailiff, constable, or other
" head officer, to pay and forfeit for every month
" not making such search, nor executing the same,
" forty shillings."

By section 16, "That no manner of artificer, or "craftman of any handicraft or occupation, hus- "bandman, apprentice, labourer, servant at hus- "bandry, journeyman, or servant of artificer, ma- "rine, fisherman, waterman, or any serving-man, "shall, from the said feast of the Nativity of St. "John Baptist, play at the tables, tennis, dice, cards, "bowls, clash, coyting, logating, or any other un- "lawful game out of Christmas, under the pain "of twenty shillings to be forfeited for every time; "and in Christmas to play at any of the said "games in their masters houses, or in their mas- "ters presence; and also, that no manner of per- "sons shall at any time play at any bowl or bowls "in open places out of his garden or orchard, "upon the pain for every time so offending to "forfeit six shillings and eight pence; and that all "justices of peace, mayors, bailiffs, and sheriffs, "and all other head officers, and every of them, "finding and knowing any manner of person or "persons using or exercising any unlawful games "contrary to this present statute, shall have full "power and authority to commit every such of- "fender to ward, there to remain without bail or "mainprize until such time that they so offending "be bounden by obligation to the King's use in "such sums of money as by the discretion of the "said justices, mayors, bailiffs, or other head offi- "cers, shall be thought reasonable, that they or

" any of them shall not from henceforth use such " unlawful games."

As by this act it was lawful for persons to procure placards or licences to keep gaming-houses, and many had been granted, " of the which (to use the words of the preamble (*a*) to 2d and 3d Phil. and Mary " robberies and many other misde- " meanours have ensued," it was found necessary to enact, that all such placards should be void; which was then done accordingly. The act of the 10th and 11th of Wil. III. (*b*) was aimed particularly against lotteries, and has been taken notice of in a preceding chapter (chap. iv. § 1, p. 48) and explained and amended by 12 Geo. II. c. 28; and therefore I shall only refer to that chapter for it.

By the 9th Ann (*c*), two justices of the peace may cause to come before them persons who " live " at great expenses, having no visible estate, pro- " fession, or calling to maintain themselves, but " support those expenses by gaming only;" and if they do not make it appear that they do not live by gaming, the justice may make them find security for good behaviour for a twelvemonth; and in default commit them till they do find security. And, by the following section, the recognizance is forfeited if they play for twenty shillings afterwards.

(*a*) c. 9. (*b*) c. 17. (*c*) c. 14, § 6.

The very next year, another act (*a*) of Parliament inflicts a penalty of 500 *l.* on persons keeping an office or place for unlawful lotteries; which may not improperly be classed as gaming-houses.

The 8 Geo. I. (*b*) is enacted for the suppression of unlawful lottery-offices; but as to these, I will observe once for all, that lottery-offices are provided against by the 12th Geo. II; to which I shall refer my reader (p. 49).

By 2 Geo. II. (*c*) it is provided, that if it is proved to a magistrate, by two or more witnesses, that any person has used any unlawful game, contrary to 33 Hen. VIII, the justice may commit him to prison, without bail or mainprize, unless he enter into recognizance, at the discretion of the justice, not to play at such game again.

By 10 Geo. II, c. 28, § 2, it is enacted, "That "if any person, &c. without such authority or li- "cense as aforesaid (which is explained in the first clause to mean letters patent from the King, or license from the Lord Chamberlain) "shall act, "represent, or perform, for hire, &c. any inter- "lude, tragedy, comedy, opera, play, farce, *or* "*other entertainment of the stage*, or any part

(*a*) 10 Ann, c. 26, § 109.
(*b*) c. 2, § 36 and 37. (*c* c. 28, § 9.

" or parts therein, he shall forfeit for every such " offence the sum of fifty pounds." And section 3 enacts, " That no person shall act, &c. for hire " any new interlude, &c. &c. unless a true copy " thereof be sent to the Lord Chamberlain, four- " teen days before the acting," &c.

The defendant (*a*) having been convicted in the penalty of 50*l.* under the stat. 10 Geo. II, c. 28, for " acting, representing, and performing a cer- tain entertainment of the stage, called Tumbling," &c. at Birmingham, in an amphitheatre erected for that purpose; the conviction was removed here *by certiorari*, in order to take the opinion of this Court on the question, Whether the offence of which the defendant was convicted, came within the statute?

Lord KENYON, C. J. " The decision in the case alluded to, of Gallini *v.* Laborie (5 T. R. 243) was perfectly right, because that clearly came within the statute 25 Geo. II, c. 36. But if I ex- pressed myself, as has been now represented, that the statute 10 Geo. II. extended to every species of stage-entertainment, I think I was mistaken. In that case it was not necessary to consider that act so particularly as it is in the present case; and our immediate attention being now called to

(*a*) Rex *v.* Handy, 6 T. R. 286.

it, I do not think that tumbling is an entertainment of the stage within the meaning of that act of Parliament; it might equally be said that fencing on a public stage is. By the third section of this act, a copy of the piece to be represented is required to be sent to the Lord Chamberlain for his approbation previous to the acting; but no copy could have been given of this entertainment. This is a penal act of Parliament, and we cannot extend it to entertainments that did not exist when the statute was made; though, perhaps, it is desirable that the prohibitions contained in the statute 25 Geo. II. with respect to London and Westminster, should be extended to the other parts of the kingdom."

By the same act, § 7 (*a*), plays, farces, &c. acted in any public-house, shall be deemed within the provisions of that act.

The act of the 18th Geo. II, c. 34, which has already been noticed at some length (p. 54) is very strict and positive as to persons keeping gaming-houses; and, after reciting that the laws then in force were by experience found ineffectual in stopping such pernicious practices, enacts, "That "from and after the twenty-fourth day of June, "One thousand seven hundred and forty-five, no "person or persons, of what condition soever, "shall keep any house, room, or place for playing,

(*a*) i. e. 10 Geo. II. c. 28.

" or permit or suffer any person or persons what-
" soever, within any such house, room, or place,
" to play at the said game of Roulet, otherwise
" called Roly-Poly, or at any other game, with
" cards or dice, already prohibited by the laws of
" this realm; and in case any person or persons
" whatsoever shall keep any such house, room, or
" place for playing, or permit or suffer any person
" or persons as aforesaid to play at the said game
" of Roulet, otherwise Roly-Poly, or at any other
" game, with cards or dice, already prohibited by
" law, such person or persons so offending shall
" incur the pains and penalties, and be liable to
" such prosecution as is directed in and by an act
" made in the twelfth year of the reign of his pre-
" sent Majesty, intituled, an act for the more effec-
" tual preventing excessive and deceitful gaming."

Soon after, however, another and more efficient act (*a*) was made, inflicting new penalties, and prescribing a particular mode of proceeding against persons keeping disorderly houses of all kinds, and naming gaming-houses in particular. By this act it is provided, section 2, " That from and after the
" first day of December, One thousand seven
" hundred and fifty-two, any house, room, gar-
" den, or other place kept for public dancing,
" music, or other public entertainment of the like

(*a*) 25 Geo. II, c. 36.

" kind, in the cities of London and Westminster,
" or within twenty miles thereof, without a license
" had for that purpose from the last preceding
" Michaelmas Quarter Sessions of the Peace to
" be holden for the county, city, riding, liberty,
" or division in which such house, room, garden,
" or other place is situate (who are hereby autho-
" rized and empowered to grant such licenses as
" they in their discretion shall think proper) sig-
" nified under the hands and seals of four or more
" of the justices there assembled, shall be deemed
" a disorderly house or place."

And, by section 4, " The act does not extend to
" Drury Lane, Covent Garden, or the theatre
" commonly called the King's Theatre, in the Hay-
" market, or any of them, nor to such performances
" as are carried on under letters patent or licence
" from the Crown or Lord Chamberlain."

Sect. 5. " That if any two inhabitants of any pa-
" rish or place, paying scot and bearing lot therein,
" do give notice in writing to any constable or other
" peace-officer of the like nature (where there is
" no constable) of such parish or place, of any
" person keeping a bawdy-house, gaming-house, or
" any other disorderly house in such parish or place,
" the constable or such officer as aforesaid so receiv-
" ing such notice shall forthwith go with such inha-
" bitants to one of his Majesty's justices of the peace
" of the county, city, riding, division, or liberty in
" which such parish or place does lie, and shall,

" upon such inhabitants making oath before such " justice that they do believe the contents of such " notice to be true, and entering into a recogni- " zance in the penal sum of twenty pounds each, " to give or produce material evidence against " such person for such offence, enter into a re- " cognizance in the penal sum of thirty pounds to " prosecute with effect such person for such of- " fence at the next General or Quarter Session " of the Peace, or the next assizes to be holden for " the county in which such parish or place does " lie, as to the said justice shall seem meet; and " such constable or other officer shall be al- " lowed all the reasonable expenses of such " prosecution, to be ascertained by any two jus- " tices of the peace of the county, city, riding, " division, or liberty where the offence shall have " been committed, and shall be paid the same by " the overseers of the poor of such parish or " place; and in case such person shall be con- " victed of such offence, the overseers of the poor " of such parish or place shall forthwith pay the " sum of ten pounds to each of such inhabitants; " and in case such overseers shall neglect or re- " fuse to pay to such constable or other officer " such expenses of the prosecution as aforesaid, or " shall neglect or refuse to pay upon demand the " said sums of ten pounds and ten pounds, such " overseers and each of them shall forfeit to the " person entitled to the same, double the sum so " refused and neglected to be paid."

By section 6, "That upon such constable or "other officer entering into such recognizance "to prosecute as aforesaid, the said justice of the "peace shall forthwith make out his warrant to "bring the person so accused of keeping a bawdy-"house, gaming-house, or other disorderly house, "before him, and shall bind him or her over to "appear at such General or Quarter Session or "Assizes, there to answer to such bill of indict-"ment as shall be found against him or her for such "offence; and such justice shall and may, if in "his discretion he think fit, likewise demand and "take security for such person's good behaviour "in the mean time, and until such indictment "shall be found, heard, and determined, or be "returned by such Grand Jury not to be true "bill."

By section 7, "That in case such constable shall "neglect or refuse upon such notice to go before "any justice of the peace, or to enter into such "recognizance, or shall be wilfully negligent in "carrying on the said prosecution, he shall for "every such offence forfeit the sum of twenty "pounds to each of such inhabitants so giving no-"tice as aforesaid."

By section 8, "That any person who shall at "any time hereafter appear, act, or behave him "or herself as master or mistress, or as the person

" having the care, government, or management of " any bawdy-house, gaming-house, or other dis- " orderly house, shall be deemed and taken to be " the keeper thereof, and shall be liable to be " prosecuted and punished as such, notwithstand- " ing he or she shall not in fact be the real owner " or keeper thereof."

By section 9, "That upon any such prosecution " against any person for keeping a bawdy-house, " gaming-house, or other disorderly house, any " person may give evidence against the defendant " or on behalf of the defendant in such prosecution, " notwithstanding his or her being an inhabitant " or parishioner in the said parish or place, or " having entered into such recognizance as afore- " said."

An agreement to perform at a place not licenced by this act is void; as appears here (*a*). — The plaintiff brought this action upon a contract, by which the defendant, a foreigner, undertook to come over to England, in order to dance ballets at the Italian Opera in the Haymarket, called the King's Theatre, or at such other place as the plaintiff should appoint. The defendant never came at all; but it appeared that, during the time for which the defendant had engaged, there had been no licence from the Lord Chamberlain for the

(*a*) Gallini *v.* Laborie, 5 T. R. 242.

Opera-House, though the plaintiff's company had exhibited dancing entertainments there; but the plaintiff had a licence for performing musical entertainments at an house in Hanover Square. No request, however, was made to the defendant to perform there; nor did it appear that he had any notice that the plaintiff had such a licence. A verdict was given for the plaintiff, at the Sittings after last Term at Westminster, before Lord Kenyon.

Lord KENYON, Ch. J. I think the statute of the 10th Geo. II. does extend to this and every other species of stage-entertainment. The words are general; and the intent of the Legislature manifestly was to put all places of public diversion under the controul of the magistracy. The clause requiring a copy of the entertainment to be previously given to the Lord Chamberlain, of course can only apply to such entertainments as are recited from written performances; and was intended as an additional check against a licentious use of the stage. Possibly, the notion of the statute's being confined to such productions, may have arisen from the occasion which is supposed to have given birth to it, and which was some plays, written by Mr. Gay and others, levelled against the existing administration, with intention of bringing it into disrepute with the people. The subsequent statute of the 25th Geo. II. puts all sorts of places opened

for public diversion under the direction and appointment of the magistrates at large; and is applicable to other entertainments than those of the stage. The exception in the 4th clause, that the act should not extend to the Haymarket, and the other two Royal Theatres, was inserted on a supposition that they would be licenced by the Lord Chamberlain; for the proviso goes on to say, "Nor to such performances and public entertainments as shall be carried on by virtue of letters "patent, or licence of the Crown, or of the Lord "Chamberlain." But the Legislature evidently did not mean to except these three places, unless they were licenced. Under the former act, no entertainment of the stage, of which dancing is one, can be exhibited without having the Lord Chamberlain's licence; and none having been obtained in this case, the plaintiff cannot call upon the defendant for the breach of an agreement which, without such license, it was unlawful for him to execute. As to the circumstance of other performers having recovered on similar agreements against the plaintiff for their salaries, those verdicts are right; for being engaged to the plaintiff, and ready to execute the agreement on their part, they ought not to suffer because he did not obtain a licence, which it was his business to have procured.

Ashurst, J. The Legislature did not mean by the statute 25 Geo. II. to give any magic virtue to

the walls of the Opera-House in the Haymarket; but merely that that place, which was supposed to be licenced by the Lord Chamberlain, need not have any licence from the other magistrates. But that clause cannot extend to the Opera-House, unless it be so licenced.

Buller, J. As to the argument drawn from the words of the agreement, that the defendant was bound to dance at any other place besides the Haymarket Theatre, which the plaintiff should appoint, it must be observed, that all the evidence points to that place alone. If the plaintiff had wished the defendant to dance elsewhere, he ought to have given him notice of it: but the only place specifically mentioned in the agreement is the Haymarket Theatre; and it does not appear that the plaintiff required the defendant to dance in any other place.

Grose, J. Assenting.

A penalty of 40*s.* is inflicted on publicans, knowingly suffering any gaming with cards, dice, drafts, shuffle-boards, mississipi, or billiard-tables, skittles, nine-pins, or with any other implement of gaming, in their houses, for the first offence; and 10*l.* for the second, by the 30th Geo. II (*a*).

(*a*) c. 24, § 14.

Of the 42d Geo. III, c. 119, I have already taken notice very fully (p. 56) and mention here only by way of perfecting the catalogue of acts relating to Gaming-Houses, and therefore shall only refer to it.

These statutes are so comprehensive, and the common law on the subject so plain, that it is scarcely necessary to state more than that Gaming-Houses are indictable, and to point out where the forms of these indictments may be found. This last matter, indeed, will be the subject of my next chapter, which is exclusively dedicated to that purpose. However, as a work of this kind might, and indeed deservedly, be deemed imperfect without them, I shall proceed to state such determinations as have been made on the subject.

In 1670, one Jacob Hall (*a*) was ordered (as appears, though not directly, from the report) to abate a stage which he had erected at Charing-Cross, as a nuisance. And Hale said, "That in "the 8 Car. I. Noy came into Court, and prayed "a writ to prohibit a bowling-alley erected near "St. Dunstan's Church; and had it.

By the same case, as reported more fully in Keble (*b*), it seems the Court ordered Hall to be indicted.

(*a*) Hall's Case, 1 Mod. 76.
(*b*) 2 Keb. 846, S. C.

In Mr. J. Ventris's (*a*) report of the same case, it is said the court ordered him to be indicted; *but he being dismissed* (which, I presume, must mean the bill was not found against him) they sent for him and ordered him to enter into a recognizance of 300 *l.* not to proceed in his building; which he refused. And the court caused a record to be made of the nuisance as upon their own view (it being in their way to Westminster) and awarded a writ thereupon to the Sheriff of Middlesex, commanding him to prostrate the building.

An information may be filed against a person for keeping a cock-pit (*b*), this being an offence at common law, as well as a dicing-house, and cannot be set up by any license; as appears also by Lord Coke's third Institute. A similar (*c*) application to the last was again made to the Court in the 7th year of W. III. before Lord Holt; but the Court recommended the mode of indictment.

Keeping a gaming-house (*d*) is an offence of which a married woman may be guilty, and for which she may be punished, as was the case here: an objection, however, was taken to the

(*a*) 1 Vent. 169, S. C.
(*b*) King *v.* Howell, 3 Keb. 465.
(*c*) K. *v.* Betterton, 5 Mod. 142.
(*d*) King *v.* Dixon et Ux. 10 Mod. 335

indictment, that it would not lie against the husband and wife jointly, but the husband alone; to which the Court said, "This objection would "have weight in it if the property or ownership "of the house was the matter in question; but it "signifies nothing here, where not property, but "a *criminal management* of the house (in which "the wife may probably have as great, nay, a "greater share than the husband) is the fact "charged."

Lastly, after several others, it was objected: that as the indictment was laid, the penalty of 40*s.* a day given by the statute (33 Hen. VIII.) could not be recovered; for it is not said that *per spatium* of one day or several days they kept, &c. only that such a day, &c.

The Court. "Keeping a common gaming-"house any part of a day is enough. Indeed, "more days might have been laid; for the time "so uncertain, as to all but one day, that only "40*s.* is recoverable."

The defendant (*a*) John Liston was convicted by two Magistrates upon the 12 Geo. II. c. 28. made for preventing excessive and deceitful gaming. The information charged the defendant

(*a*) K. *v.* Liston, 5 T. R. 338.

with having on the 25th of August, 1792, at a certain house in Norris Street, set up, maintained, and kept a certain fraudulent game, to be determined by the chance of dice, under the denomination of the Game of Hazard, against the form of the statute, &c. The evidence shewed that the defendant was master of the house, and acted as master of a hazard table there, on the 25th of August; but no mention was made of any dice being used then. But on the 26th of August one witness saw a dice-box and dice on the table, round which many persons were assembled, the play having been discontinued on the witness's entering the room. The defendant was convicted in the penalty of 200*l.* To be distributed as the act did direct.

There were three objections taken to the conviction.

1. The justices had no jurisdiction.

2. The evidence does not support the charge.

3. The penalty is directed to be distributed according to the 12 Geo. II, which is altered by a subsequent act, viz. 32 Geo. III, c. 53. § 5. The adjudication, therefore, ought to have been, that the penalty should be distributed according to the last act.

To these the Court said, "There is no pretence for either of the objections. The first has been already over-ruled in a case which came before us about two years ago. The lotteries meant by the 27th Geo. III, c. 1, are state-lotteries only. As to the second objection, there was evidence sufficient to support the charge. The charge is for setting up, maintaining, and keeping a certain game, to be determined by the chance of dice, called Hazard; and the proof is, that certain persons were found in the house playing at hazard; and whether hazard were played with cards or with dice, it is equally prohibited by the act. However, if it were necessary to be stated, it does appear here that a dice-box and dice were found on the table the subsequent day, which, from the manner in which they were found, was sufficient to warrant the justices to conclude that the game at hazard was there played: and the justices were not confined to evidence on the particular day. As to the third objection, we cannot take notice of any fact which does not appear upon the face of the conviction itself; on the validity of which we are called upon to decide. It must either stand or fall on its own merits; and we cannot take in aid any extraneous information to support or to quash it.

In this chapter I may have considered cases which are not, in fact, cases of Gaming-Houses; but they bear so immediately upon the subject,

that the introduction of them will not, I hope, be deemed impertinent. It will be sufficient for me to say, that I have considered here places where games and unlawful amusements, in the nature of games, are carried on, with reference to the punishment which the laws inflict upon the keepers and frequenters of them.

CHAPTER VII.

CONTAINING A COLLECTION OF REFERENCES TO PLEADINGS IN CASES OF WAGERS AND GAMING.

IT being my intention, in order to make this work as complete as possible, to render it useful to the profession as well as others, I must make this chapter rather a *technical index* than an essay. However, before I put down the titles of the forms of pleadings, I will insert two or three cases which have decided points of pleadings. First, then, *Indebitatus assumpsit* will not lie for a wager (*a*); it must be brought on the mutual promises. And in the case of Jackson v. Colegrave, Carth. 338, the judgment of K. B. was reversed in the Exchequer Chamber for this cause.

To *assumpsit* the defendant may plead (*b*) the statute of 16 Car. II, c. 7, that the money promised was won by play, in which the defendant at one meeting lost upon tick above 100*l*. 1 Lutw. 180. Clif. 200. 5 Mod. 3.

(*a*) 1 Lord Ray, 69. 2 Lord Ray, 1034. 1 Lutw. 180. 6 Mod. 128. Holt 328.

(*b*) Co. Dig. "Pleader" (2 G. 8.)

And if he lost it at one meeting *(a)* to several persons, it is within the act. 3 Keb. 671. Lutw. 180.

If an action *(b)* is brought upon the statute 33 H. VIII. c. 9, for using unlawful games, the plaintiff may recite the statute, and shew a breach. Lutw. 133.

To this action the defendant may *(c)* plead *quod non custodivit domum lusorum, &c.* Lutw. 134.

The defendant *(d)* may plead the statute of 16 Car. II, to a bond that it was given for money won at play. Clift. 187. Lutw. 485.

But the statute is not pleadable *(e)* where debt is brought for a wager when he was at play. 5 Mod. 6. Lutw. 487.

It is sufficient for the defendant to say *(f)*, that the money was won at play, and that the bond was given for it, without following the words of the

(*a*) Co. Dig. "Pleader" (2 G. 8.)
(*b*) Co. Dig. "Pleader" (2 S. 24.)
(*c*) Co. Dig. as above.
(*d*) Co. Dig. "Pleader" (2 W. 26.)
(*e*) Co. Dig. as above.
(*f*) Coleborn *v.* Stockdale, 1 Stra. 493.

statute. But he must mention the game that the money was won at.

On a case *(a)* reserved, it appeared that the *(b)* action of debt was brought on 9 Ann *(c)* by a common informer against Sir T. F. for winning 525*l.* of G. L. at cards. The money was lost and paid March 11, 1757; and the original not sued out till Mic. 1762. The court of C. B. held it a case within 31 Eliz. though the action given in the first instance to the party grieved, and afterwards to the common informer, for himself and the poor of the parish; for such action would have been within the 7 H. VIII; and the 31 Eliz. was made to narrow the time given by that statute, and therefore could never mean to leave any actions unrestrained in time. The latter part of the clause must therefore be construed to extend to them.

If the defendant pleads *(d)* that the bond was given for money won at cards, and the plaintiff replies that it was given for a just debt, *and not* for money won at play, this is a good replication, and ought to conclude to the country, for it denies the whole of the defendant's plea.

(a) This seems to be the case, Frederick, Bart. *v.* Lookup, in error. 4 Bur. 2018.

(b) Bull. N. P. 195.

(c) c. 14.

(d) 2 T. R. 439, Hedges *v.* Sandon.

Proceedings against defendant for keeping a (*a*) gaming-house, on 18 Geo. II, c. 34, § 1, have been stayed; because, by a previous statute (12 Geo. II, c. 28, § 1.) the penalty is payable on conviction before a justice of the peace.

In *assumpsit (b)* the defendant may plead the general issue, and give the gaming consideration in evidence; but he must plead it specially to an action of debt on bond, &c. for it cannot be given in evidence under *Non est factum. (c)* An action on 9 Ann for money won at play is not within 4 Ann; so two pleas cannot be pleaded. Barnes 365. Co. Dig. "Pleader," E. 2.

Indebitatus assumpsit will lie against a stakeholder (*d*); and so in Eggleton *v.* Lewin, 3 Salk. 175, which seems to have been the case of a stakeholder.

If a man agrees to ride for a wager (*e*) without whip, *or* stick, or other arms, an allegation that he rode without whip *and* stick, or other arms, is unexceptionable as an averment of performance. Held good after verdict for him; but the Court thought it would have been bad upon a demurrer.

(*a*) 1 Tidd. 468. (*b*) 1 Tidd. 591.
(*c*) 1 Tidd. 595 and 596.
(*d*) Anonymous, 12 Mod. 81
(*e*) Burgess *v.* Bracher, 2 Lord Ray. 1366.

In this case *(a)* the court of K. B. permitted a composition of prosecution on the statute of gaming. The affidavit stated, that the defendant and one A. B. used to play at cards together, and that defendant had won several sums of money of A. B.; that A. B. was become a bankrupt, and the assignees, who set this prosecution on foot were satisfied with respect to the defendant, and therefore it was moved that the prosecutor might have leave to compound: which was granted by the Court.

It is discretionary *(b)* in the Court to give or withhold leave to compound a penal action; and they will judge each particular case by its own merits. In the case of an action (on 25 Geo. II. c. 36) for keeping a disorderly house, it was refused.

In this case *(c)* the court permitted the plaintiff to withdraw his plea to a bond of *non est factum*, and to plead the statute of gaming.

(a) Anonymous, 1 Wils. 130.

(b) 1 Tidd. 501, Bellis *v.* Beale, M. 38 Geo. III, there quoted.

(c) Jefferys *v.* Walter, 1 Wils. 177.

DECLARATIONS.

1. DECLARATION, on a wager concerning the weight of hogs. Second count upon a wager (the plaintiff's mare against four guineas) concerning the weight of some hogs (*a*).

Pleader's Assistant, 97.

2. Declaration. In consideration plaintiff had paid 5*l*. 7*s*. 6*d*. to defendant, he promised to pay plaintiff 20 pounds in case he married within six months, and one hundred if he ever married.

Ibid. 143.

3. Declaration, in special *assumpsit* for a wager. First count, 50 guineas to 50 guineas, one of which was deposited on either side, that the plaintiff would marry in a quarter of a year. Second count upon a wager 50 guineas to 50 guineas. Third count same as the first, that plaintiff would marry in twelve months. *Ibid.* 216.

4. Declaration on a horse-race.

Hern's Pleader, 176.

5. Declaration on a shooting-match. *Ibid.*

(*a*) Amongst these and the following precedents, especially the more modern ones, there are many very loosely drawn. I insert them only because they may be useful as general forms; and do not vouch for the correctness of any of them.

6. Declaration, on a wager to carry barley, &c. with a cart and horse from the bottom to the top of a hill, on such a day, or pay plaintiff 8*l.* Defendant paid plaintiff 2*s.* 6*d.* and undertook to make it up 8*l.* *Brownlow Redic.* 29.

7. Declaration, on a wager at wrestling. *Hern's Pleader*, 79.

8. Declaration, on a wager, Whether a man at backgammon should be moved or not? 5 *Mod.* 1.

9. Declaration, for a wager that the owner of the house wherein plaintiff dwelt, had promised the defendant's wife the refusal or first offer of buying the same. *Morgan's Prec.* 192.

10. Declaration, in case, in K. B. on a wager on a cock-match. *Winche's Ent.* 98.

11. Declaration, on a wager concerning the weight of two penny loaves of rye bread. *Ibid.* 110.

12. Declaration, in the palace court, on a wager whether the defendant had become bail for one H. M. in a suit between the now plaintiff and the said H. M. In consideration that the plaintiff had paid the defendant 5*l.* defendant promised to pay plaintiff 10*l.* if defendant became bail, &c. with an averment that he had. 1 *Went.* 100.

13. Declaration. In consideration that plaintiff had promised to pay B. P 1000*l.* if the said B. P. should outlive him: the said defendant promised to pay said plaintiff 1000*l.* if he survived the said B. P. Avers that B. P. is dead, and that he has survived him. Second count laying the promises to have been by the executors of each to pay the survivor, &c. 1 *Went.* 102.

14. Declaration, in *assumpsit*, to recover 9*l.* 19*s.* 6*d.* won at pitch-halfpenny. *Ibid.* 107.

15. Declaration, upon a bet, Whether one S. Tye had or had not bought a certain waggon? each side depositing one shilling. Two other counts. *Ibid.* 108.

16. Declaration, on a cock-match. In consideration that W. undertook to pay H. 5*s.* in case a certain cock (who was in a likely way to win) should win, H. undertook to pay W. 10*l.* if he should lose. *Ibid.* 110.

17. Declaration, on a horse-race at Newmarket; the bet was in writing, "I take with Mr. Bolton, "this 12th of April, 400 Guineas to 200 Guineas, "that Trentham and Pumpkin both win." And underneath was written, "They are to run next "meeting with Minister and Mambrino."

"*Geo. Neale.*"

Minister paid forfeit to Trentham, and Mambrino to Pumpkin.

1st Count special; 2nd, varying the first; 3d Count more general. 1 *Went.* 111.

18. Declaration, on a wager 25*l.* each side, that a certain poney should trot eleven miles in one hour; the stake to be paid to one W. G. If either party refused to deposit his stake, he was to forfeit 8*l.* 8*s.* *Ibid.* 113.

19. Declaration, on a bet of 120 guineas, that Kelly's horse Piper, beat Forbes's horse Quill, and won a sweepstakes of 300 guineas. *Ibid.* 115.

20. Declaration, on a wager upon the amount of the duty upon hops for the year 1773. *Ibid.* 116.

21. Declaration. At the time of making the said promises, a certain race was to be run (between the Earl of March and T. T. that if a certain carriage, and a person sitting in it, drawn by four horses, should go 19 miles in one hour, the Earl would win); plaintiff promised to pay defendant 8*l.* if the Earl lost; defendant promised to plaintiff ten pounds if the Earl won. *Ibid.* 117.

22. On a wager That "Sir H. H. would be "*called to the House of Peers.*" 2nd Count, "should be *created* a Peer." 3d Count, "should "be *made* a Peer." *Ibid.* 118.

23. For money won at play. 1 *Went.* 118.

24. Declaration, on a bet at bowls, two to one, pay or play. Breach, that defendant would not play, therefore forfeited. *Ibid.* 119.

25, Declaration. Plaintiff and several other persons agree to subscribe 100*l.* each, to be run for by horses; one to be named by each person, or pay half forfeit. That plaintiff was unwilling to name a horse; that, in consideration, the plaintiff would permit the defendant to name a horse for him, the defendant promised to the plaintiff his losing. 2 *Went.* 541.

26. Declaration, for money won at whist. *Ibid.* 543.

27. Declaration, for money won at cards. *Ibid.* 544.

INDICTMENTS.

1. At common law, for winning goods at an unlawful game, by throwing dice.
Cro. Cir. Com. 310.

2. For a cheat with false cards, at the game of whist, and with false dice, at the game called Passage. *Trem. Pl.* 91.

3. For the like, with false dice, at the game of hazard. *Ibid.* 93.

4. For keeping a common raffling-shop.
Ibid. 241.

5. Information on the stat. 33 H.VIII. against a Vintner, for keeping unlawful games in his house, exhibited to a Judge of the Common Pleas in vacation. *Ibid.* 263.

6. For winning above 10*l.* at cards, at one time.
Cro. Cir. Com. 435.

7. For winning above 10*l.* at cards, at one time and sitting, by which the defendant acquired, &c. from the loser, by the hands of a third person.
Ibid. 437.

8. For winning above 10*l.* at cards, at one time and sitting, not being within any of the King's palaces. *Cro. Cir. Com.* 438.

9. For fraudulently winning money at dice. *Ibid.* 439.

10. For a nuisance in keeping a gaming-house. 2 *Bur.* 1232,

PLEAS, &c. and DEMURRERS.

1. Plea to declaration on a bill of exchange, (stat. 16 Car. II.) against gaming; that the bill was given for money lost at hazard, by Lord Chandois to the plaintiff. 3 *Lord Raymond*, 96.

2. Justification to assault and battery: that plaintiff played with false dice; had won money of defendant by cozenage; and defendant took, in order to carry him to a Justice of the Peace, held good. *Cro. Car.* 234.

3. Plea to a declaration, on a wager in the Palace Court, concluding to the country.
1 *Went.* 101.

4. Demurrer to plea to declaration on bill of exchange (stat. 16 Car. II.) against gaming, that it amounts to the general issue only.
3 *Lord Raymond*, 98.

5. Replication, that the bond was given for a just debt, and not for money won at gaming, concluding to the country. 2 *T. R.* 439.

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